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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 398

ROY BUTE, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JULY 5, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 398

ROY BUTE, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fol. 1] Caption Omitted

[fol. 2]

IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, 1946

No. 29887

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

vs.

ROY BUTE, Plaintiff in Error

Error to Circuit Court, LaSalle County

Honorable Robert E. Larkin, Judge Presiding

MOTION FOR LEAVE TO SUE AS A POOR PERSON FOR WRIT OF ERROR WITHOUT PAYMENT OF COSTS AND FOR LEAVE TO FILE EIGHT TYPEWRITTEN ABSTRACTS & BRIEFS—Filed October 10, 1946

Roy Bute, the plaintiff in error in the above cause, appearing pro se, respectfully states to the Court the following:

1. That in cause number 40158 in the Circuit Court of LaSalle County he was sentenced to serve a term of one to twenty years in the penitentiary for the crime of Indecent Liberties.

2. That said sentence was imposed on June 20, 1938.

3. That he wishes to sue out a writ of error to review the proceedings in the Circuit Court of LaSalle County in said cause number 40158.

4. That he is a poor person without sufficient funds to pay costs of this Court or to furnish the required number of printed abstracts and briefs.

Wherefore, Roy Bute respectfully moves this Court for leave to sue as a poor person for writ of error without payment of costs and for leave to file eight typewritten abstracts and briefs.

Respectfully Submitted, Roy Bute, #13883, Box 1112, Joliet, Illinois.

[fol. 3] *Duly sworn to by Roy Bute; jurat omitted in printing.*

[fol. 4] IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, 1946,

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

vs.

ROY BUTE, Plaintiff in Error

Error to Circuit Court, LaSalle County

Honorable Robert E. Larkin, Judge Presiding

MOTION FOR LEAVE TO SUE AS A POOR PERSON FOR WRIT OF ERROR WITHOUT PAYMENT OF COSTS AND FOR LEAVE TO FILE EIGHT TYPEWRITTEN ABSTRACTS & BRIEFS—Filed October 10, 1946

Roy Bute, the plaintiff in error in the above cause, appearing pro se, respectfully states to the Court the following:

1. That in cause number 40159 in the Circuit Court of LaSalle County he was sentenced to serve a term of one to twenty years in the penitentiary for the crime of Indecent Liberties.

2. That said sentence was imposed on June 20, 1938.

3. That he wishes to sue out a writ of error to review the proceedings in the Circuit Court of LaSalle County in said cause number 40159.

4. That he is a poor person without sufficient funds to pay costs of this Court or to furnish the required number of printed abstracts and briefs.

Wherefore, Roy Bute respectfully moves this Court for leave to sue as a poor person for writ of error without payment of costs and for leave to file eight typewritten abstracts and briefs.

Respectfully submitted, Roy Bute, #13883, Box 1112, Joliet, Illinois.

[fol. 5] *Duly sworn to by Roy Bute; jurat omitted in printing.*

[fol. 6] [File endorsement omitted.]

[fol. 7] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER GRANTING LEAVE TO FILE PETITION FOR WRIT OF ERROR WITHOUT PAYMENT OF COSTS, ETC.—November 22, 1946

And now on this day, the Court having duly considered the motion by plaintiff in error for leave to file a writ of error herein as a poor person and for leave to file eight typewritten copies of abstract and brief, and being fully advised in the premises,

The motion is allowed and leave is granted plaintiff in error to file a petition for writ of error without the payment of costs, and petitioner is ruled to file record, abstract and brief on or before twenty days before the first day of the next term of Court. Leave to withdraw petition is granted, if requested before the record is filed.

It is further ordered by the Court that leave be granted plaintiff in error to file eight typewritten copies of abstract and brief herein.

[fol. 8] And afterwards, to-wit: on the sixth day of December, 1946, the same being one of the days in vacation after the term of Court aforesaid, there was filed in the office of the Clerk of the Supreme Court an authenticated copy of the common law record of the circuit court of La-Salle County, which is in the words and figures following, to-wit:

[fol. 9] Caption in Cause No. 40158 omitted.

[fol. 10] IN CIRCUIT COURT OF LA SALLE COUNTY

JOURNAL ENTRY—June 13, 1938

Naw at 1:30 o'clock P. M. on this the first day of the said June Term, A. D. 1938 of the Circuit Court aforesaid, there are present as heretofore written, and the Court is opened by Proclamation according to law.

Whereupon there is returned into open Court the venire including the first five names of the supplemental venire, heretofore issued out of and under the seal of the said Circuit Court of La Salle County, Illinois, from which it appears by the return of the Sheriff endorsed thereon that the

following named persons have been duly summoned to appear before this Court on this day to serve as Grand Jurors at the present term of this Court, viz: Wm. Hall, Chas. Morrell, Julius Pitts, Jess Olson, Marie Benedetti, Chas. Rosling, W. H. Stockley, H. G. Harms, Henry Thies, Alex Leberton, Mike Cusick, Frank Palmer, Arthur Henning, James Bailey, Ralph C. Woodward, Frank H. Steinbach, Jr., Anthony Arnold, Charles Cleer, Joseph Shawback, Joe Daley, Charles Wilkins, W. P. Rose, Fraeme Currie, Chas. Denzine, Chas. E. Black, Elmer Mackey, Louis Turchi, Paul A. Schmidt:

And the said Grand Jury being now called answer to their respective names and give their attendance upon the Court. Whereupon Henry Thies, Mike Cusick, Charles Cleer, Graeme Currie, Chas. Denzine, Chas. E. Black and Elmer Mackey showing good cause to the Court are excused from service herein by the Court.

[fol. 11] And it appearing to the Court for good cause shown that the regular panel of Grand Jurors is not full, it is therefore ordered that the Sheriff select at random seven (7) persons from the supplemental Grand Jury list to act as Grand Jurors on the present panel.

It is therefore ordered by the Court that the Grand Jurors who are present be excused, to report at 10 o'clock tomorrow morning.

[fol. 12] In Circuit Court of La Salle County

Hon. Robert E. Larkin, Presiding

Journal Entry—June 14, 1938

Now at 1:30 o'clock P. M., on this day come the Grand Jurors heretofore chosen herein, together with Emmett Nagle and Wm. Murry, selected from the supplemental panel to serve as Grand Jurors.

Thereupon the Court appoints Ralph Woodward as foreman of the Grand Jury.

Whereupon the foreman and said Grand Jurors are each duly sworn as the law directs and are instructed by the Court as to their duties as Grand Jurors and thereupon retire to their room in charge of an officer duly sworn to consider of indictments and such matters as may be brought before them.

[fol. 13] In Circuit Court of La Salle County

Indictment—Filed June 17, 1938

Hon. Robert E. Larkin, Presiding

Now on this day the same being one of the days of the regular June Term of the Circuit Court of La Salle County, Illinois for the year aforesaid, come the Grand Jurors into open Court and by their foreman present to the Court the following indictments as true bills:

40158

The People of the State of Illinois

vs.

Roy Bute

Indictment for Taking Indecent Liberties with Children

A True Bill

[fol. 14] State of Illinois,
La Salle County, ss:

Of the June Term of the La Salle County Circuit Court, in the year of our Lord 1938.

The Grand Jurors, Chosen, selected and sworn, in and for the County of La Salle, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards, did then and there unlawfully and feloniously take certain immoral, improper and indecent liberties with a certain female child, under the age of fifteen (15) years, and of the age of eight (8) years, to-wit, Irene Reeland, with intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of La Salle aforesaid, in the name and by the authority of the People of the State of

Illinois, upon their oaths aforesaid, do further present: That the said Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards did then and there unlawfully and feloniously attempt to take certain immoral, improper and indecent liberties with a certain female child under the age of fifteen (15) years and of the age of (8) years, to-wit, Irene Reeland, by then and there taking down the pants of the said Irene Reeland and attempting to play with the private parts of her the said Irene Reeland, with the intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute, but that he, the said Roy Bute, failed in his said attempt, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

(Signed) Taylor E. Wilhelm, State's Attorney in and for said County of La Salle.

[fol. 15] [Endorsed]: No. 40158. June Term, A. D. 1938. La Salle County Circuit Court. The People of the State of Illionis vs. Roy Bute. Indictment for Taking Indecent Liberties with Children. A True Bill. Signed: Ralph C. Woodward, Foreman of the Grand Jury. Witnesses: Dorothy Reeland, Harry Reynolds, Norma Jean Thew, Robert Rierson, Frank Kouser, John Hopkins, Donald Decker. Bail fixed at $10,000. Sgd. R. E. L., Judge. Filed June 17, A. D. 1938. Sgd. Edw. T. Ryan, Clerk.

[fols. 16-17] IN CIRCUIT COURT OF LA SALLE COUNTY

Hon. Robert E. Larkin, Presiding

40158

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

ROY BUTE

Indictment for Taking Indecent Liberties with Children

A True Bill

ORDER FIXING BAIL—June 20, 1938

Now on this day it is ordered by the Court that bail herein be, and the same is hereby fixed at Ten Thousand ($10,000.00) Dollars.

[fol. 18] IN CIRCUIT COURT OF LA SALLE COUNTY

Hon. Robert E. Larkin, Presiding

40158

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

ROY BUTE

Indictment for Taking Indecent Liberties with Children

A True Bill

ARRAIGNMENT AND PLEA OF GUILTY—June 20, 1938

Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.

And the said defendant being now arraigned before the bar of this Court moves the Court for leave to enter his plea

of Guilty of the crime of taking indecent liberties with children in manenr and form as charged in the first count of the indictment herein; and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.

[fol. 19] Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.

Thereupon the Court finds the age of the said defendant to be fifty-seven (57) years.

JUDGMENT

Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the judgment of the Court should not now be pronounced against him on his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

Whereupon it is Ordered by the Court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years.

Therefore, It Is Ordered and Adjudged by the Court that the said defendant, Roy Bute, be taken from the bar of this Court to the common jail of La Salle County, from whence he came, and from thence by the Sheriff of said La Salle County to the Penitentiary of this State of Joliet, and be delivered to the Warden or Keeper of said Penitentiary, and the said Warden or Keeper is hereby required and commanded to take the body of said defendant, Roy Bute, and confine him in said Penitentiary in safe and secure custody, or on parole, from and after the delivery [fol. 19a] hereof for a period of not less than one (1) year,

nor more than twenty (20) years, and until discharged by the Prison Board as authorized and directed by law.

Thereupon by leave of Court first had and obtained, the State's Attorney enters Nolle Prosequi as to the second count of the indictment herein.

[fol. 20] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 21] [Caption in Cause No. 40159 omitted.]

[fols. 22-24] Journal entries showing selection of Grand Jury omitted. Printed side page 10 ante.

[fol. 25] IN CIRCUIT COURT OF LA SALLE COUNTY

INDICTMENT—Filed June 17, 1938

Hon. Robert E. Larkin, Presiding

Now on this day the same being one of the days of the regular June Term of the Circuit Court of La Salle County, Illinois for the year aforesaid, come the Grand Jurors into open Court and by their foreman present to the Court the following indictments as true bills:

40159

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

ROY BUTE

Indictment for Taking Indecent Liberties With Children

A True Bill

[fol. 26] STATE OF ILLINOIS,
La Salle County, ss:

Of the June Term of the La Salle County Circuit Court, in the year of our Lord 1938.

The Grand Jurors, Chosen, selected and sworn, in and for the County of La Salle, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards, did then and there unlawfully and feloniously take certain immoral, improper and indecent liberties with a certain female child, under the age of fifteen (15) years, and of the age of eleven (11) years, to-wit, Dorothy Reeland, with intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of La Salle aforesaid, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present: That the said Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards did then and there unlawfully and feloniously attempt to take certain immoral, improper and indecent liberties with a certain female child under the age of fifteen (15) years and of the age of eleven (11) years, to-wit, Dorothy Reeland, by then and there taking down the pants of the said Dorothy Reeland and attempting to play with the private parts of her the said Dorothy Reeland, with the intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute, but that he, the said Roy Bute, failed in his said attempt, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

(Signed) Taylor E. Wilhelm, State's Attorney in and for Said County of La Salle.

[fol. 27] [Endorsed:] No. 40159. June Term, A. D. 1938. La Salle County Circuit Court. The People of the State of Illinois vs. Roy Bute. Indictment. For Taking Indecent Liberties with children. A True Bill. Signed: Ralph C. Woodward, Foreman of the Grand Jury. Witnesses: Dorothy Reeland, Harry Reynolds, Irene Reeland, Norma Jean Thew, Robert Rierson, Frank Kouser, John Hopkins, Donald Decker. Bail fixed at $10,000. Sgd: R. E. L., Judge. Filed June 17, A. D. 1938. Sgd: Edw. T. Ryan, Clerk.

[fol. 28] In Circuit Court of La Salle County

Hon. Robert E. Larkin, Presiding

#40159

The People of the State of Illinois

vs.

Roy Bute

Indictment for Taking Indecent Liberties With Children

A True Bill

Order Fixing Bail—June 20, 1938

Now on this day it is ordered by the Court that bail herein be, and the same is hereby fixed at Ten Thousand ($10,000.00) Dollars.

[fol. 29] In Circuit Court of La Salle County

Hon. Robert E. Larkin, Presiding

#40159

The People of the State of Illinois

vs.

Roy Bute

Indictment for Taking Indecent Liberties With Children

A True Bill

Arraignment and Plea of Guilty—June 20, 1938

Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.

And the said defendant being now arraigned before the bar of this Court moves the Court for leave to enter his plea of Guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein; and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.

[fol. 30] Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.

Thereupon the Court finds the age of the said defendant to be fifty-seven (57) years.

Judgment

Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the

judgment of the Court should not now be pronounced against him on his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

Whereupon it is Ordered by the Court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years.

Therefore, It Is Ordered and Adjudged by the Court that the said defendant, Roy Bute, be taken from the bar of this Court to the common jail of La Salle County, from whence he came, and from thence by the Sheriff of said La Salle County to the Penitentiary of this State at Joliet, and be delivered to the Warden or Keeper of said Penitentiary, and the said Warden or Keeper is hereby required and commanded to take the body of said defendant, Roy Bute, and confine him in said Penitentiary in safe and secure custody, [fol. 31] or on parole, from and after the delivery hereof for a period of not less than one (1) year, nor more than twenty (20) years, and until discharged by the Prison Board as authorized and directed by law.

This sentence to be separate and in addition to and not concurrently with Indictment Number 40158.

Thereupon by leave of Court first had and obtained, the State's Attorney enters Nolle Prosequi as to the second count of the Indictment herein.

[fols. 32-34] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 35] IN THE SUPREME COURT OF ILLINOIS, JANUARY TERM, 1947

No. 29887

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

vs.

ROY BUTE, Plaintiff in Error

Error to Circuit Court La Salle County

Honorable Robert E. Larkin, Judge Presiding

Abstract of Record—Filed December 6, 1946

CAUSE No. 40158

Placita.

June 14, 1938, Grand Jurors duly sworn, instructed, and retire to consider of indictments and such matters as may be brought before them.

June 17, 1938, Grand Jurors present a true bill in cause number 40158.

Indictment number 40158.

Count 1: The Grand Jurors present that Roy Bute on May 19, 1938, at and within the County of La Salle, the said Roy Bute being a male person of the age of seventeen years and upwards, did then and there unlawfully and feloniously take certain immoral, improper and indecent liberties with a certain female child, under the age of fifteen years, and of the age of eight years, to-wit, Irene Reeland, with intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute, contrary to the statute, etc.

[fol. 36] Count 2: The Grand Jurors further present that Roy Bute on May 19, 1938, at and within the County of La Salle, the said Roy Bute being a male person of the age of seventeen years and upwards did then and there unlawfully and feloniously attempt to take certain immoral, improper and indecent liberties with a certain female child under the age of fifteen years and of the age of eight years, to-wit, Irene Reeland, by then and there taking down the pants of the said Irene Reeland and attempting to play with the private parts of her the said Irene Reeland, with the intent

of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute, but that he, the said Roy Bute, failed in his said attempt, contrary to the statute, etc.

June 20, 1938.

Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.

And the said defendant being now arraigned before the bar of this Court moves the Court for leave to enter his plea of Guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein; and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.

[fol. 37] Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.

Thereupon the Court finds the age of the said Defendant to be fifty-seven (57) years.

Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the judgment of the Court should not now be pronounced against him on his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

Whereupon it is Ordered by the Court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years.

Therefore, It Is Ordered and Adjudged by the Court that the said defendant, Roy Bute, be taken from the bar of this

Court to the common jail of La Salle County, from whence he came, and from thence by the Sheriff of said La Salle County to the Penitentiary of this State at Joliet, and be delivered to the Warden or Keeper of said Penitentiary, and the said Warden or Keeper is hereby required and commanded to take the body of said defendant, Roy Bute, and confine him in said Penitentiary in safe and secure custody, or on parole, from and after the delivery hereof for a period of not less than one (1) year, nor more than twenty (20) years, and until discharged by the Prison Board as authorized and directed by law.

[fol. 38] Thereupon by leave of court first had and obtained the State's Attorney enters Nolle Prosequi as to the second count of the indictment herein.

Certification of the Clerk of the Circuit Court of La Salle County.

CAUSE No. 40159

Placita.

June 14, 1938, Grand Jurors duly sworn, instructed, and retire to consider of indictments and such matters as may be brought before them.

June 17, 1938, Grand Jurors present a true bill in cause number 40159.

Indictment number 40159.

Count 1: The Grand Jurors present that Roy Bute on May 19, 1938, at and within the County of La Salle, the said Roy Bute being a male person of the age of seventeen years and upwards, did then and there unlawfully and feloniously take certain immoral, improper and indecent liberties with a certain female child, under the age of fifteen years, and of the age of eleven years, to-wit, Dorothy Reeland, with intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute, contrary to the statute, etc.

Count 2: The Grand Jurors further present that Roy Bute on May 19, 1938, at and within the County of La Salle the said Roy Bute being a male person of the age of seventeen years and upwards did then and there unlawfully and feloniously attempt to take certain immoral, improper and indecent liberties with a certain female child under the age of fifteen years and of the age of eleven years, to-wit, Dorothy Reeland, by then and there taking down the

[fol. 39] pants of the said Dorothy Reeland and attempting to play with the private parts of her the said Dorothy Reeland with the intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute, but that he, the said Roy Bute, failed in his said attempt, contrary to the statute, etc.

June 20, 1938.

Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.

And the said defendant being now arraigned before the bar of this court moves the court for leave to enter his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein; and the court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, the court grants such leave.

Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein.

Thereupon the court finds the age of the said defendant to be fifty-seven (57) years.

[fol. 40] Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the judgment of the court should not now be pronounced against him on his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

Whereupon it is Ordered by the court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years.

Therefore, It is ordered and adjudged by the court that the said defendant, Roy Bute, be taken from the bar of this court to the common jail of La Salle County from whence he came and from thence by the Sheriff of said La Salle County to the penitentiary of this state at Joliet and be delivered to the warden or keeper of said penitentiary, and the said warden or keeper is hereby required and commanded to take the body of said defendant Roy Bute and confine him in said penitentiary in safe and secure custody, or on parole, from and after the delivery hereof for a period of not less than one (1) year nor more than twenty (20) years, and until discharged by the Prison Board as authorized and directed by law.

[fol. 41] This sentence to be separate and in addition to and not concurrently with Indictment Number 40158.

Thereupon by leave of court first had and obtained the State's Attorney enters Nolle Prosequi as to the second count of the indictment herein.

Certification of the Clerk of the Circuit Court of La Salle County.

ERRORS RELIED UPON FOR REVERSAL

1. Defendant was denied representation by counsel as guaranteed by state and federal constitutions.

2. Defendant was denied due process and equal protection guaranteed by state and federal constitutions because the trial court did not advise him of his rights and of his right to have the assistance of counsel.

3. Defendant was denied a fair and impartial trial as guaranteed by state and federal constitutions because the statute requiring him to state on oath that he is unable to procure counsel before the court is empowered to appoint counsel places the duty of knowing his right to counsel and of claiming such right on the defendant, thereby rendering said statute unconstitutional and violative of Article 2, Sections 2, 9, 10, 19, and 20 of the state constitution, and violative of the due process and equal protection clauses of the 14th amendment to the federal constitution, and because it creates a favored class of those accused who know the law and discriminates against and creates another class of those who do not know the law.

4. Defendant was deprived of a fair and impartial trial as guaranteed by state and federal constitutions because he

was rushed to trial with such expedition as to deprive him of such trial.

5. Defendant was denied due process and equal protection guaranteed by state and federal constitutions because sentence of imprisonment was imposed without the trial court making a finding of guilt.

6. Defendant was denied due process and equal protection guaranteed by state and federal constitutions because sentence of imprisonment was imposed on a plea and for an offense not charged in the indictment.

Respectfully submitted, Roy Bute, No. 13883, Box 1112, Joliet, Illinois, Plaintiff in Error Appearing Pro Se.

Earl Nicholson on Brief.

[fols. 42-43] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER OF SUBMISSION—January 20, 1947

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that plaintiff in error hath filed herein a duly certified common law record of the court below, together with typewritten abstracts thereof, and brief and argument in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 44] IN SUPREME COURT OF ILLINOIS

Docket No. 29887—Agenda 12—January, 1947.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

v.

ROY BUTE, Plaintiff in Error

OPINION—Filed March 19, 1947.

MR. JUSTICE WILSON, delivered the opinion of the court:

By two separate indictments returned in the circuit court of La Salle county on June 17, 1938, the defendant, Roy Bute, fifty-seven years of age, was charged with the crime of taking indecent liberties with a child. In the first indictment the child was an eight-year-old girl; in the second an eleven-year-old girl. On June 20, 1938, the defendant was duly arraigned and entered a plea of guilty to both indictments. Defendant was thereupon sentenced to imprisonment in the penitentiary for a term of from one to twenty years on each indictment, the sentences to run consecutively and not concurrently. Appearing *pro se*, Bute prosecutes this writ of error. No bill of exceptions has been filed.

Defendant first contends that he was denied representation by counsel. The common-law record discloses neither an attempt to appear and defend by counsel nor a request that the court assign counsel to conduct the defense. There is no showing that defendant was denied representation by counsel of his own choosing and, in the absence of a request, there was no duty upon the court to appoint counsel for him. *People* v. *Russell*, 394 Ill. 192; *People* v. *Stack*, 391 Ill. 15; *People* v. *Fuhs*, 390 Ill. 67; *People* v. *Childers*, 386 Ill. 312.

Defendant next complains that the trial court did not advise him of his right to have the assistance of counsel and asserts that an affirmative waiver of the right to counsel must appear upon the face of the record. The right to be heard by counsel is guaranteed by section 9 of article II of our constitution. The right to have counsel appointed by the court is granted by statute. (Ill. Rev. Stat. 1945, chap. 38, par. 730.) Defendant's argument relates solely to the right to have the assistance of counsel appointed

by the court. There is no mandatory constitutional requirement that counsel be assigned to an accused. Indeed, due process under the fourteenth amendment to the Federal constitution does not require that counsel be assigned to accused, even where requested. (*Betts* v. *Brady*, 316 U. S. 455.) Our statute provides that when a person charged with a crime shall state upon oath that he is unable to procure counsel the court shall assign him competent coun-[fol. 45] sel. (Ill. Rev. Stat. 1945, chap. 38, par. 730.) We have repeatedly held that the right to representation by counsel is personal to a defendant and may be waived or claimed as he himself elects, and that no duty rests upon the court to provide legal assistance for an accused unless he states upon oath his inability to procure counsel. (*People* v. *Russell*, 394 Ill. 192; *People* v. *Brauer*, 389 Ill. 100; *People* v. *Corrie*, 387 Ill. 587; *People* v. *Corbett*, 387 Ill. 41.) Nor is there any requirement, constitutional or statutory, that the court advise defendant of his rights under the statute. (*People* v. *Corrie*, 387 Ill. 587; *People* v. *Lavendowski*, 326 Ill. 173; *People* v. *Kawoleski*, 310 Ill. 498.) Furthermore, there is no requirement that the waiver of the statutory right to counsel appear upon the face of the judgment order. In the absence of a showing in the record to the contrary, the presumption obtains that the court discharged its duty to the defendant in all respects. *People* v. *Fuhs*, 390 Ill. 67; *People* v. *Corbett*, 387 Ill. 41.

The third error assigned as ground for reversal is that the statute relating to the appointment of counsel in criminal cases violates both the State and Federal constitutions because it places on a defendant the duty to know of his right to counsel and discriminates against those who do not know the law in favor of those who are conversant with the statute. This question was not raised in the trial court and it cannot be raised for the first time in a court of review. *People* v. *Berglin*, 309 Ill. 488.

Defendant next asserts that he was rushed to trial with such expedition as to deprive him of a fair trial. The indictments were presented on June 17, 1938, and on the third day thereafter defendant was arraigned, pleaded guilty and sentenced. This cause being here on the common-law record, the extent of our inquiry is circumscribed by what that record contains. (*People* v. *Burnett*, 395 Ill. 179; *People* v. *Conn*, 391 Ill. 190.) Since there is no indication in the record that defendant either requested or was re-

fused additional time within which to prepare his defense, the contention is without merit. *People* v. *Foster,* 394 Ill. 194; *People* v. *Russell,* 394 Ill. 192; *People* v. *Street,* 353 Ill. 60.

Defendant further contends that the sentence of imprisonment is illegal because it was imposed without the trial court making a finding of guilt. It will be observed that defendant entered a plea of guilty. Under such circumstances, it follows, as a legal inference, that the court [fol. 46] finds the defendant guilty and it is not necessary for the court to enter such finding. *People* v. *Werner,* 364 Ill. 594; *Hoch* v. *People,* 219 Ill. 265. See: *People* v. *Andrae,* 295 Ill. 445; *People* v. *Rave,* 392 Ill. 435.

Lastly, defendant urges reversal on the ground that he was sentenced for the offense of taking indecent liberties with children, an offense not charged in the indictments. In the first count of each indictment defendant is charged with taking indecent liberties with a child—not with children. Defendant's objection is hypercritical. Moreover, the judgment orders, so far as pertinent, read: "Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein." The law does not require specific repetition and it is sufficient that the judgment order recites a plea of guilty in manner and form as charged in a particular count of the indictment. *People* v. *Wooten,* 392 Ill. 468; *People* v. *Jensen,* 392 Ill. 72; *People ex rel. Hutchinson* v. *Murphy,* 188 Ill. 144.

The judgments of the circuit court of La Salle county are affirmed.

Judgments affirmed.

[fols. 47-48] IN SUPREME COURT OF ILLINOIS

No. 29887

PEOPLE STATE OF ILLINOIS, Defendant in Error,

vs.

ROY BUTE, Plaintiff in Error

Error to Circuit Court La Salle County (40158-40159)

JUDGMENT—March 19, 1947

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgments aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgments of the circuit court of La Salle County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error.

[fol. 49] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed April 8, 1947

Now comes Roy Bute, the plaintiff in error, and respectfully petitions the Court for a rehearing in the above cause, and states in support thereof that the Court overlooked and misapprehended the law involved as follows:

In its opinion the Court stated that there is no mandatory constitutional requirement that counsel be assigned to an accused and that due process under the 14th amendment to the Federal constitution does not require that counsel be assigned to an accused; even where requested. The Court further stated that there is no requirement, constitutional

or statutory, that the trial court advise a defendant of his rights, and that there is no requirement that the waiver of the statutory right to counsel appear upon the face of the record.

It is respectfully submitted that well considered opinions of the Supreme Court of the United States and of other Federal courts hold otherwise.

In *U. S. ex rel. Hall v. Ragen*, 60 F. Supp. 820, the third branch of the syllabus states as follows:

> [fol. 50] "The fundamental right of assistance of counsel in criminal prosecution is guaranteed in the federal courts by the Sixth Amendment and in state courts by the Fourteenth Amendment."

In *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. at page 65, the Supreme Court of the United States said, in speaking of the 14th amendment:

> "* * * it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law * * *"

In the very recent case of *DeMeerleer v. Michigan*, 67 S. Ct. 596, the Supreme Court of the United States said:

> "The record indicates that petitioner was without legal assistance throughout all these proceedings and was never advised of his right to counsel * * * At no time was assistance of counsel offered or mentioned to him * * * Under the holdings of this Court, petitioner was deprived of rights essential to a fair hearing under the Federal Constitution."

In *Johnson v. Zerbst*, 304 U. S. 458, the Supreme Court of the United States said:

> "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution."

In the *Johnson v. Zerbst* case, supra, the Court further held that a waiver of the constitutional right to assistance of counsel at a criminal trial should appear in the record.

Such a waiver affirmatively appears in the record submitted to this Court in the case of *People v. Carter*, 391 Ill. 594, and we quote from that record as follows:

> "* * * Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant [fol. 51] Harice Leroy Carter commonly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment."

On the foregoing record, the Supreme Court of the United States, in *Carter v. Illinois*, 67 S. Ct. 216, said:

> "A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel."

In the recent case of *People v. Creviston*, 396 Ill. 78, we find the following:

> "The record shows that plaintiff in error entered a plea of guilty to the charge of robbery as charged in the indictment; that the court, before accepting the plea, fully advised him of his legal rights and admonished him of the consequences of his plea: * * *"

Because of the foregoing we sincerely believe this Honorable Court misapprehended and misstated the law in its opinion in the instant case.

In the *Carter* case, supra, the record submitted to this Court shows not only that the trial court advised the defendant as to his constitutional right to have a lawyer appointed, but also advised him as to other constitutional rights—and it shows further that Carter consciously and

knowingly waived such rights and persisted in pleading guilty. The record in the *Crowiston* case, supra, shows that he was advised of his rights. And we submit that the records in both of these cases shows a compliance with the requirements of the 14th amendment as stated in many cases by the Supreme Court of the United States. Both records show that the defendants were advised of their rights and that they waived their rights.

The instant case is on another footing. The record in the instant case shows only that the court admonished the defendant as to the penalty that would result from his plea of guilty. (Abst. 2, 5, Rec. 8, 19) It fails to show that defend-[fol. 52] ant was advised of his constitutional right to have counsel, and it fails to show a waiver of such right. Such waiver should appear in the record. *Johnson v. Zerbst*, supra.

Wherefore, the record in this case fails to show a compliance with constitutional due process as announced in many cases by the Supreme Court of the United States, the final arbiter of what constitutes due process, and it appears that the opinion of this Court runs clearly counter to applicable decisions of the Supreme Court of the United States.

Consequently, a rehearing should be allowed and on such rehearing this cause should be reversed.

In concluding this portion of our petition for rehearing we respectfully suggest that the record in the case at bar indicates that the defendant was without legal assistance throughout the proceedings against him. He was confronted by serious and complicated criminal charges and nothing was said in his defense. The record is silent as to the court advising him of his right to counsel. At no time was assistance of counsel offered or mentioned to him. He was ignorant of his right to have counsel appointed to defend him, and the effect of this Honorable Court's opinion is that his ignorant failure to claim his right to have counsel appointed for him removes the protection of the Constitution.

In other words, this Court says that a defendant in Illinois has no rights if he ignorantly fails to claim them.

This surely can not be the law. The Supreme Court of the United States says it is not the law. This Court should be governed by what the Supreme Court of the United States has said. And a rehearing should be allowed.

[fol. 53] The Court disposed of our third assignment of error by stating that the question was not raised in the trial court and it can not be raised for the first time in a court of review.

Our third assignment of error deals with the statute, *Ill. Rev. Stat.* Ch. 38, Sec. 730, and we complained that such portion of the statute as required the defendant to state upon oath that he was unable to procure counsel before the court was empowered to appoint counsel for him was unconstitutional in that it effectively circumvented a defendant's constitutional right to have the assistance of counsel if he was ignorant of the statutory requirement.

We further complained that the statute wrongfully places on a defendant the duty of knowing the law—that the statute creates a favored class of those accused who know the law and who are thereby favored with representation by counsel appointed by the court, and discriminates against and creates another class of those accused who do not know the law and who are thereby denied their right to have counsel appointed. Such complaint, we think, involves a constitutional question of the highest importance—it involves the due process and equal protection clauses of the 14th amendment to the Federal constitution—and the statute is clearly violative of the 14th amendment.

Yet this Court says that the question can not be considered because it was not raised in the trial court.

We respectfully suggest that if plaintiff in error had known enough law to raise this constitutional question in the trial court, he would also have known that he must state on oath his inability to procure counsel, and he could then have enjoyed the assistance of counsel. The Court has disposed of this important question by application of a mere technical rule, which rule should fall in the face of the con-
[fol. 54] stitution. The Court has disposed of this important question by imputing fault to the defendant's ignorance of legal procedure.

Wherefore, the Court should allow a rehearing, ignore the technical rule, and decide the constitutionality of the statute involved.

Respectfully submitted, Roy Bute, #13883, Box 1112, Joliet, Illinois, Plaintiff in Error, Pro Se.

Earl Nicholson, On Petition.

[fol. 55] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—May 19, 1947

And now on this day the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing herein.

[fol. 56] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 17, Misc.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 13, 1947

On Consideration of the motion for leave to proceed herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 17, Misc.

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted, and the case is ordered transferred to the appellate docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Petitioner pro se. In forma pauperis (granted 10/13/47). Vide 17 Misc. File No. 52,628. Illinois Supreme Court. Term No. 398. Roy Bute, Petitioner, vs. People of the State of Illinois. Petition for writ of certiorari and exhibit thereto. Filed July 5, 1947. Term No. 398, O. T. 1947.

COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Petition not printed

No. 398

ROY BUTE,

Petitioner.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

VICTOR BRUDNEY,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 398

ROY BUTE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Illinois (R. 20-22) is reported at 396 Ill. 588, 72 N. E. (2d) 813.

Jurisdiction

The jurisdiction of this Court is invoked under § 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, § 344).

The decision of the Supreme Court of Illinois is a final judgment of the highest court of the State of Illinois in which a decision in the suit could be had. It was filed on

March 19, 1947 (R. 20). A petition for rehearing was denied on May 19, 1947 (R. 28). Petitioner's motion for leave to proceed in *forma pauperis* in this Court and his petition for certiorari were filed on July 5, 1947 (R. 29), and granted on October 13, 1947 (R. 28).

Questions Presented

1. Whether the due process of law commanded by the Fourteenth Amendment to the Constitution of the United States required the assignment of counsel to petitioner before his plea to the accusation here levelled was accepted.

2. Whether upon the record here presented, as construed by the Supreme Court of Illinois, petitioner intelligently and knowingly waived his right to assignment of counsel.

Constitutional and Statutory Provisions Involved

The relevant provisions of the Constitution of the United States and of the Constitution and statutes of the State of Illinois are set forth in the Appendix, *infra*, page 39 *et seq.*

Statement

On June 17, 1938, petitioner, then aged 57, was charged in two separate indictments, each containing two counts, with having committed the crime of taking indecent liberties with a child on May 19, 1938. Except for the differences in the names and ages of the two children, apparently sisters, the indictments were identical (R. 5-6, 9-11). The first count of each charged petitioner solely in the language of the statute (Ill. Rev. Stat. (1937), c. 38, § 109) with the crime of taking indecent liberties with a child. The second count of each charged peti-

tioner in concrete detail, as well as in the language of the statute with attempting unsuccessfully to commit the substantive offense.[1]

On June 20, 1938, petitioner was arraigned in a proceeding whose formal correctness may be inferred from the language of the judge's minutes (R. 7-9, 12-13):

> "Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.
>
> And the said defendant being now arraigned before the bar of this Court moves the Court for leave to enter his plea of Guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein; and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.
>
> Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.
>
> * * * * * *
>
> JUDGMENT
>
> Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the judgment of the Court should not now be pronounced against him on his plea of

[1] Both the completed offense and the attempt are included in the statutory definition of the crime. They are separate offenses (*People* v. *Crane*, 302 Ill. 217; *People* v. *Phipps*, 338 Ill. 373) and each is punishable by imprisonment from one to twenty years. See Appendix *infra*, pp. 39-40.

guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

Whereupon it is Ordered by the Court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years.

* * * * * *

Thereupon by leave of Court first had and obtained, the State's Attorney enters Nolle Prosequi as to the second count of the Indictment herein."

The sentences imposed on each conviction were to run consecutively (R. 13). Petitioner is presently confined in the penitentiary.

Pursuant to leave granted on November 22, 1946, to sue out a writ of error as a poor person (R. 3), petitioner filed in the Supreme Court of Illinois an Abstract of Record, a copy of the common law record and a statement of the errors relied upon.[1] Apart from certain claims of error not here relevant,[2] petitioner contended that he was "denied representation by counsel", that he was "denied due process

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[1] The statutory writ of error (Ill. Rev. Stat. (1937), c. 38, § 771) is a channel of direct review of criminal convictions. On consideration of writs of error, if no bill of exceptions is filed, the Illinois Supreme Court confines its review to matters appearing in the common law record. *People* v. *Carter*, 391 Ill. 594, aff'd 329 U. S. 173; *People* v. *Haupris*, 396 Ill. 208. The common law record includes the indictment, the judge's minutes of the arraignment, the plea, the verdict and judgment. No bill of exceptions was filed in this case.

[2] Petitioner also contended that the Illinois statute requiring assignment of counsel (Ill. Rev. Stat. (1937), c. 38, § 730) denied to him the equal protection of law which the 14th Amendment requires (R. 18). The Supreme Court of Illinois ruled that this contention "was not raised in the trial court and it cannot be raised for the first time in a court of review" (R. 21). Since this is an explicit ruling on a question of state procedure, however anomalous it may be, the contention would appear to be foreclosed in this Court.

and equal protection * * * because the trial court did not advise him of his rights and of his right to have the assistance of counsel", and that he "was deprived of a fair and impartial trial * * * because he was rushed to trial with such expedition as to deprive him of such trial", all in violation of the State and Federal constitutions (R. 18-19).

In affirming the conviction and sentence, the Supreme Court of Illinois ruled that petitioner was not, as he claimed, denied representation by counsel because "the common-law record discloses * * * [no] attempt to appear and defend by counsel", and there is "no showing that defendant was denied representation by counsel of his own choosing." Nor was he entitled to the appointment of counsel because the common law record does not disclose that he requested appointment of counsel, and "in the absence of a request, there was no duty upon the court to appoint counsel for him." "There is no mandatory constitutional requirement that counsel be assigned" and the Illinois statute authorizing appointment of counsel does not require "the court to provide legal assistance for an accused unless he states upon oath his inability to procure counsel" (R. 20-21).

His claim that he was not advised of his rights was rejected on the ground that there is no "requirement, constitutional or statutory, that the court advise defendant of his rights under the statute. Furthermore, there is no requirement that the waiver of the statutory right to counsel appear upon the face of the judgment order. In the absence of a showing in the record to the contrary, the presumption obtains that the court discharged its duty to the defendant in all respects" (R. 21).

To petitioner's contention that he was rushed to trial with such expedition as to deprive him of a fair trial, the court replied, "Since there is no indication in the record that defendant either requested or was refused additional time within which to prepare his defense, the contention is without merit" (R. 21-22).

Specification of Errors to be Urged

The Supreme Court of Illinois erred

1. In affirming the judgment and sentence of the Circuit Court of LaSalle County..

2. In holding that there is no mandatory constitutional requirement that counsel be assigned to an accused.

3. In holding that petitioner's failure to request assignment of counsel constituted a competent and intelligent waiver of his right to assignment.

4. In failing to hold that, upon the accusation here made, petitioner was constitutionally entitled to the assignment of counsel.

5. In failing to hold that petitioner did not competently and intelligently waive his right to assignment.

6. In failing to reverse the judgment and sentence of the Circuit Court of LaSalle County.

Summary of Argument

Petitioner's conviction without assistance of counsel can only be sustained if he was not entitled to appointment of counsel or if he waived such assistance. He submits that due process of law under the Fourteenth Amendment made appointment of counsel his right, and that he did not waive it.

I

The Fourteenth Amendment requires counsel to be appointed for an accused who is unable, without assistance, to appraise and meet the particular charges with which he is faced. Whether his inability to defend is the result of the accused's personal limitations—of age, education or

intelligence—or a function of the complexity of the legal problems inherent in defense against the particular accusation levelled, the accused's right is to the aid of "counsel of experience and skill." And, in the latter case, the scope of the right is measured by the complexity of the defenses fairly open under the law of the State, not by the defenses to which the evidence in his particular case might confine the accused.

In this case, petitioner was faced with problems of defense which were beyond the reach of "even an intelligent and educated layman." Trial of the charges imperatively required skilled assistance to overcome the "passion or prejudice" which are inevitable concomitants of the accusation of taking indecent liberties with children. Legal defenses, such as intoxication or insanity, are beyond the competence of the "ordinary layman" to comprehend, or to assert effectively on his own behalf in the face of the accusation here made. The distinctions between the felony charged and the cognate misdemeanor are such that, unaided, petitioner could not know of which he was guilty, if either. Nor could petitioner, unassisted, avail himself of the opportunity regularly accorded in Illinois, as elsewhere, to plead guilty to a lesser offense.

So far as the record shows, nothing said or done by either the trial judge or the district attorney afforded petitioner any assistance to compensate for his lack of counsel.

II

Petitioner did not competently waive his right to the legal assistance he is shown to have required. The right to counsel cannot be surrendered effectively unless it is done "with eyes open". And before a court can find such effective surrender there must be some suggestion—however faint—either of fact or of law, that the accused had his eyes open to the right he is asserted to have waived. The record here contains no evidence from which petitioner's knowledge of his right to assignment of counsel

may be inferred. And nothing in the law of Illinois suggests either that he was advised of, or can be presumed to have understood his right. If neither the record nor the Supreme Court of Illinois suggested that petitioner knew of his right to appointment of counsel, this Court cannot find that he competently waived it.

Argument

The Supreme Court of Illinois affirmed petitioner's conviction upon the explicit assumptions that the Constitution of the United States imposes no obligation upon a State to assign counsel to a person accused of serious crime, and that an accused who fails to claim his State created right to assignment of counsel, by that failure alone, waives his constitutional right. Petitioner submits that the Supreme Court of Illinois erred in both assumptions. He contends that in pertinent circumstances an accused is entitled to assignment of counsel "as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence" (*Foster* v. *Illinois*, 332 U. S. 134, 137) and that his case presents such pertinent circumstances, as they have been delineated by the decisions of this Court. He contends further that, under the decisions here, he cannot be found to have waived his right to assignment of counsel unless he had knowledge of the existence of that right; that he had no such knowledge and that neither the record here nor the law of Illinois suggests that he was aware of his right.

I

Due process of law under the Fourteenth Amendment entitled petitioner to the assignment of counsel before his plea to the indictment lodged against him was accepted.

A. Petitioner was entitled to assignment of counsel if he required legal assistance in order adequately to make his defense to the charges here levelled.

Although it now appears plain that due process of law under the Fourteenth Amendment does not command the assignment of counsel to an accused "in every case, whatever the circumstances" (*Foster* v. *Illinois*, 332 U. S. 134, 137, compare *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275), it is equally plain that where serious crime is charged, due process of law requires such assignment if assistance of counsel is shown to be "essential to the substance of a hearing", or necessary to afford the accused "ample opportunity to meet an accusation" (*Foster* v. *Illinois*, 332 U. S. 134, 137; *Palko* v. *Connecticut*, 302 U. S. 319, 327). The scope thus delineated for a State's obligation to assign counsel has only recently been articulated in these terms (cf. *Carter* v. *Illinois*, 329 U. S. 173; *Betts* v. *Brady*, 316 U. S. 455). But the decisions here since *Powell* v. *Alabama*, 287 U. S. 45, have consistently invoked a meaningful test of the "essentiality" of counsel's presence to "the substance of a hearing". Repeatedly they have measured the accused's right to assignment of counsel by his demonstrated need for trained assistance in appraising and defending against the particular charges directed at him. While the opinions in some of the cases may have implied broader scope, the decisions point to no narrower a conclusion than that the "opportunity to meet an accusation" is not constitutionally "ample" without the assignment of counsel, when the accused is shown to have been

"incapable adequately of making his own defense" (*Powell* v. *Alabama*, 287 U. S. 45, 71; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *Rice* v. *Olson*, 324 U. S. 786).

Since the measure of the right, in non-capital as well as in capital cases (*Rice* v. *Olson, supra*; cf. *Canizio* v. *New York*, 327 U. S. 82; *White* v. *Ragen*, 324 U. S. 760), is thus the inability of the accused to meet the accusation alone, inquiry here has been directed to whether, on the record presented, the particular defendant required legal assistance in order to appraise and answer the particular charges made. Relevant to that inquiry, of course, have been the circumstances surrounding his arrest, detention, arraignment and conviction. Coercive or deceptive practices by the prosecution create their own need for the assistance of counsel, entirely apart from the capacities of the accused or the nature of the charge (cf. *Smith* v. *O'Grady*, 312 U. S. 329; *Ex parte Hawk*, 321 U. S. 114). Relevant also have been the accused's personal limitations —whether of age (cf. *De Meerleer* v. *Michigan*, 329 U. S. 663), intelligence (cf. *Powell* v. *Alabama*, 287 U. S. 45) or education (cf. *Marino* v. *Ragen*, No. 93, October Term, 1947). If, because of them, he is unable to understand his rights or make his defense, his need for assistance, and therefore his constitutional right to appointment of counsel is established.

But the young and the illiterate are not the only defendants who may require legal assistance. Indeed, the articulate premise upon which assignment of counsel is predicated is that "Even the intelligent and educated layman has small and sometimes no skill in the science of law • • • " (*Powell* v. *Alabama*, 287 U. S. 45, 69), and to defend adequately, at least against many types of accusation, he "needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity or of his own ignorance or bewilderment" (*Williams* v. *Kaiser*, 323 U. S. 471, 476). Hence, this Court, examining the specific accusa-

tions levelled in particular cases, has emphasized the subtlety and complexity of the issues facing the defendant. When defense has been found to be of such complexity or difficulty as to be fairly "beyond the capacity of even an intelligent and educated layman" (*Rice* v. *Olson*, 324 U. S. 786, 789; *Williams* v. *Kaiser; Tomkins* v. *Missouri, supra;* cf. *Hawk* v. *Olson*, 326 U. S. 271, 277-278), assignment of counsel has been required. When, however, the case involved only a "simple issue" of fact, and the state court had found that the accused, "a man forty-three years old, of ordinary intelligence," had sufficient "ability to take care of his own interests on the trial of that narrow issue", and had in fact had some prior relevant experience with criminal procedure, assignment was held unnecessary (*Betts* v. *Brady*, 316 U. S. 455, 472). In the light of later decisions here (*Rice* v. *Olson; Tomkins* v. *Missouri; Williams* v. *Kaiser;* cf. *Canizio* v. *New York, supra; White* v. *Ragen*, 324 U. S. 760, 764), the court's conception of the scope of the defendant's need in that case seems unduly narrow. But nothing in that decision suggests that any standard other than the accused's ability to defend against the particular charges levelled determines his right to assignment of counsel.

If the test of the accused's right is thus his incompetence alone to appraise and meet the issues implicit in the charges against him, his right cannot be lost by the fact that the evidence in his case may preclude him from successfully raising or meeting those issues. In establishing his right to assistance, as the decisions here make plain, the accused need not show that the facts in his case would enable him to prevail in his defense, whether it is based upon an attempt to show guilt of only a lesser offense (*Williams* v. *Kaiser; Tomkins* v. *Missouri, supra*) or upon some other ground (*Rice* v. *Olson, supra*). No more need a person whose trial would present sufficient difficulty to require assistance demonstrate that he would prevail if he went to trial (cf. *Hawk* v. *Olson, supra; Adams* v. *U. S.*,

ex rel. McCann, 317 U. S. 269, 279). In each case, his need is measured by the defenses the law of the state fairly allows against the particular accusation, not the defenses to which he would be confined, or which he could sustain, on the evidence that the State might have against him. Any narrower test of his right would nullify the essential object of entitling him to counsel, by denying a fair opportunity to defend on the ground that a court which cannot know all the evidence believes he would have small chance of success, or could only make the kind of defense for which no legal assistance was needed.

By the same token, neither the fact that the defendant pleaded guilty (*Williams* v. *Kaiser; Rice* v. *Olson; Tomkins* v. *Missouri, supra; House* v. *Mayo,* 324 U. S. 42) nor the fact that he failed to request appointment of counsel (*Rice* v. *Olson; Tomkins* v. *Missouri, supra*) alters his right to such assistance. His need for informed aid is hardly lessened by the inadequacy of his own conscious understanding of the possibilities of defense.

This is not to say that an accused who believes he is guilty is obliged to defend, or cannot plead guilty unless he knows what defenses are open in law to the charges against him. Inability to assess and meet an accusation does not, in every case, render a defendant incompetent to decide to plead guilty or to make his own defense. An accused may waive the benefit of assignment of counsel in the very circumstances in which his incapacity to make a defense would entitle him to such assignment (cf. *Rice* v. *Olson, supra,* and compare *Von Moltke* v. *Gillies,* No. 73, Oct. Term, 1947). This is the plain import of *Carter* v. *Illinois,* 329 U. S. 173, 177, where "the accused, with his rights fully explained to him, consciously chose to dispense with counsel", and of *Foster* v. *Illinois,* 332 U. S. 134, 138, where "the court before accepting the plea duly advised [defendant] of 'his rights of Trial' and of the consequences of such a plea". But whether or not the accused "intelligently and understandingly" (*Rice* v. *Olson,* 324 U. S. 786, 789)

chose to plead guilty or to dispense with counsel's aid is a different question, to be resolved, as we shall show, by different criteria, than whether or not his right to a fair opportunity to defend entitled him to skilled assistance.

So far as his right to assistance is concerned, petitioner contends, and the decisions here establish, that due process of law requires assignment of counsel to an accused who is faced with a charge against which he cannot defend without "counsel of experience and skill" (*Rice* v. *Olson*, 324 U. S. 786, 789). To be sure, at least in cases of collateral attack, the accused has the burden of proving that to answer adequately the particular accusation lodged against him he required assistance (*Williams* v. *Kaiser*, 323 U. S. 471; *Hawk* v. *Olson*, 326 U. S. 271). But, if he establishes that the charges levelled could not be fairly evaluated and met by "even an intelligent and educated layman" (*Rice* v. *Olson, supra;* cf. *Hawk* v. *Olson*, 326 U. S. 271, 277-278) he is entitled to assignment of counsel as a matter of constitutional right.

Petitioner submits that, tested by this standard, he was entitled to have counsel appointed for him before his plea of guilty was accepted.

B. Petitioner required the assistance of counsel in order adequately to make his defense to the accusation here levelled.

Petitioner was faced with what has long been recognized as "an accusation easily made, hard to be proved and still harder to be defended by one ever so innocent" (I Hale, Pleas of Crown, 634, as quoted in *People* v. *Freeman*, 244 Ill. 590, 594). It does not require any citation to evidence dehors the record to establish that "in prosecutions for crimes of this kind against children", "public indignation is * * * apt to be aroused" (*People* v. *Freeman*, 244 Ill. 590, 594), and that a person faced with such charges, particu-

larly in a small community [1] within a month after the crime is alleged to have been committed, has more difficulties to overcome in establishing his innocence than does a person accused of assault or larceny or some other offense against the person or property which is less apt to outrage normal citizens (*People* v. *Langaas*, 339 Ill. 267, 274; cf. *People* v. *Lucania*, 360 Ill. 150, 164). In the face of the pressure which such charges thus place upon an accused, petitioner was required to choose among the alternatives which the law of Illinois allowed to meet them.

If petitioner were wholly blameless, his burden could not be carried without assistance. A defense resting upon denial of the acts charged might not only oblige him to take the stand to deny commission of them (*People* v. *Martin*, 380 Ill. 328; *People* v. *Freeman; People* v. *Langaas, supra;* compare *People* v. *Crowe*, 390 Ill. 294), but would require him to attempt to impeach or rebut such evidence as the State might produce either by the prosecutrix (cf. *People* v. *Karpovich*, 288 Ill. 268; *People* v. *Schwahauer*, 369 Ill. 261) or in corroboration (cf. *People* v. *Herzberger*, 372 Ill. 251; *People* v. *Crane; People* v. *Freeman; People* v. *Martin*, 380 Ill. 328) and, in turn, to offer character and reputation evidence which would be sufficiently convincing to overcome the State's case (*People* v. *Bernsee*, 367 Ill. 518; *People* v. *Martin*, 380 Ill. 328; *People* v. *Langaas*, 339 Ill. 267; *People* v. *Haas*, 293 Ill. 274; cf. *People* v. *Crane*, 302 Ill. 217). The decisions of the Illinois Supreme Court leave little doubt that on the accusation here levelled "even the intelligent and educated layman", "unfamiliar with the rules of evidence" stands in imminent danger of being "put

[1] The offense was alleged to have been committed in LaSalle County. Sources not constituting part of the common law record indicate that the locus of the crime charged was a public park in Streator, Ill., a town of 15,000 people (Rand McNally World Atlas, 1940).

on trial without a proper charge,[1] and convicted upon incompetent evidence,[2] or evidence irrelevant to the issue [3] or otherwise inadmissible" [4] (*Powell* v. *Alabama*, 287 U. S. 45, 69). It may be doubted that in this case, the "skill and knowledge adequately to prepare his defense, even though he have a perfect one" are within the reach of the average layman (cf. *Powell* v. *Alabama*, 287 U. S. 45, 69). But even if petitioner could prepare his own defense, "evidence and truth are of no avail unless they can be adequately presented * * * in court" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279). To assert that the presentation of a defense—whether before a judge or jury—in the shadow cast by the accusation here lodged, would require the most delicate kind of judgment and the highest degree of skill at the trial is to understate petitioner's task. Regardless of how competent a layman of "ordinary intelligence" might be to conduct the trial of any conventional offense against property (cf. *Betts* v. *Brady*, *supra*), there can be little doubt that to establish innocence of the offense here charged "counsel of experience and skill" (*Rice* v. *Olson*, *supra*) was required.

If petitioner's defense rested not upon blamelessness in fact, but upon a legally recognized excuse, such as intoxication or insanity,—defenses which have a demonstrated rele-

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[1] See e.g. *People* v. *Crane*, *supra*; *People* v. *Phipps*, 338 Ill. 373.

[2] See e.g. *People* v. *Phipps*; *People* v. *Bernsee*, *supra*; *People* v. *Kwilosz*, 368 Ill. 461; *People* v. *Romano*, 306 Ill. 502.

[3] Compare *People* v. *Bernsee* and *People* v. *Herzberger*, *supra*, with *People* v. [illegible]*ck*, 314 Ill. 237; cf. *People* v. *Crowe*, *supra*.

[4] It does not detract from the difficulty of a defendant's task to note that during the only period for which statistics are available, 1917-1927, at least six of the fifteen cases of crimes against children brought to the Illinois Supreme Court were reversed; reversal because of erroneous exclusions or admissions of evidence predominated among such cases (Illinois Association for Criminal Justice, Illinois Crime Survey (1929), pp. 116-117).

vance to the crime charged [1]—his capacity to perceive its availability would depend upon a knowledge of distinctions in Illinois law which are "unknown to the average layman" (*Tomkins* v. *Missouri*, 323 U. S. 485, 488). The "specific intent" which is of the essence of the crime may be disproved by a showing of intoxication (*People* v. *Klemann*, 383 Ill. 236) or insanity (Ill. Rev. Stat. (1937), c. 38, §§ 590, 592; cf. *People* v. *Gilmore*, 320 Ill. 233; *People* v. *Johnson*, 298 Ill. 52). The tests by which Illinois determines the sufficiency of the defenses of intoxication [2] or

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[1] See e.g. The Problem of Sex Offenses in New York City, Report of the Citizens Committee on the Control of Crime (1938), pp. 9-10. The particular offenses here charged "because of their inherent nature, warrant a presumption of mental abnormality in the criminal." Of the 55 persons charged with the felony here involved, 10 were found insane and seven mentally defective. Of 60 persons charged with the cognate misdemeanor, 13 were found insane and 17 mentally defective. But *cf.* Report of Mayor's Committee for Study of Sex Offenses (1940), Ch. VII. See also, Mental Abnormality and Crime, English Studies in Criminal Science (McMillan & Co., 1944), Ch. VIII, IX; compare treatment of sex offenders in Illinois prisons (1937), 5 Univ. of Chi. L. Rev. 89, 91.

Although it is not part of the common law record (*People* v. *Haupris*, 396 Ill. 208), it may be noted, in considering the defenses fairly open to petitioner, that he was characterized in the official statement which the convicting judge forwarded to the warden of the prison pursuant to Ill. Rev. Stat. (1937), c. 38, § 806, as a "low grade moron" and that he appears to have a record of habitual drunkness.

[2] Compare *Schwabacher* v. *People*, 165 Ill. 618, 630 (defendant must be "incapable of forming such intent") with *People* v. *Klemann*, 383 Ill. 236, 239 (defendant must prove he "was intoxicated to that degree that he was incapable of entertaining the specific intent, and that he neither then nor afterwards yielded it the sanction of his will") *cf. People* v. *Cozzie*, 397 Ill. 620; *People* v. *Wright*, 287 Ill. 580. See also *People* v. *Gilday*, 351 Ill. 11, where only the first portion of the latter test seems to be applied, and *People* v. *Cochran*, 313 Ill. 508, which adverts to the relationship between intoxication and insanity. Compare Meredith, W. C. J., Insanity as a Criminal Defense (1931), pp. 56-59; Weihofen, H., Insanity as a Defense in Criminal Law (1933), pp. 87-94.

insanity [1] are no less elusive than those constantly found difficult to comprehend by trained criminologists and lawyers.[2] Without assistance, petitioner could not know whether they covered his case even if he could discern their general availability. And, if he did understand their applicability, his capacity to present them by himself would hardly be "adequate". The evidence to sustain a defense of intoxication is itself so damaging (cf. *People* v. *Klemann*, *supra*) that its presentation must necessarily be made in a manner which is sufficiently persuasive to overcome the prejudicial effects upon the trier of facts which its mere assertion would import in a case of this character. A different, but no less difficult, problem [3] would confront the

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[1] In 1929, the Illinois Association for Criminal Justice observed that "from the standpoint of *principle* there is no phase of the criminal law more puzzling, nor one that is more unsatisfactory" than that dealing with insanity as a defense (Illinois Crime Survey, *supra*, p. 136). See generally C. J. Hynning, Mental Disorder in Illinois Criminal Law (1933), 12 Chicago Kent Law Rev. 19; Illinois Crime Survey, *supra*, c. XV. Illinois formally appears to prescribe the "good and evil" test as the determinant of a defendant's sanity (*cf.* Ill. Rev. Stat. (1937), c. 38, §§ 590, 592). But see *O'Shea* v. *People*, 218 Ill. 352; *People* v. *Lowhone*, 292 Ill. 32; *People* v. *Marquis*, 344 Ill. 261; *People* v. *Cochran*, 313 Ill. 508; *People* v. *Krauser*, 315 Ill. 485; *People* v. *Varecha*, 353 Ill. 52, for the varieties of mental condition it covers, and the relationships which must obtain between the acts charged and the accused's mental condition; and compare *People* v. *Johnson*, 298 Ill. 52. Particularly relevant here is the possibility that a person of "sub-normal mentality" (*People* v. *Marquis*, at 267; *People* v. *Varecha*, *supra*), or an habitual drunkard (*People* v. *Cochran*, *supra*) might come within the defense.

[2] See Weihofen, H., Insanity as a Defense in Criminal Law (1933), pp. 14-147; and generally Glueck, S. S., Mental Disorder and the Criminal Law (1925); Meredith, W. C. J., Insanity as a Criminal Defense (1931); Michael and Wechsler, Criminal Law and Its Administration (1940), pp. 807-860, 903-920.

[3] See Hynning, *supra*, n. 1, and Michael and Wechsler, *supra*, n. 2, at pp. 860-902. See also *State* v. *Farrell*, 223 N. C. 321.

accused who attempted to establish his own insanity at the time of committing the acts charged.[1]

If petitioner were guilty at most of the misdemeanor of contributing to the delinquency of a minor, he could not respond intelligently to the indictment without knowing the distinctions between the offense charged and that of which alone he might be guilty. The former requires a specific intent (*People* v. *Klemann, supra*). The latter requires only that a person shall "knowingly or wilfully cause, aid or encourage", or "do acts which directly tend to" induce, a child to commit "indecent or lascivious conduct" (Ill. Rev. Stat. (1937), c. 38, §§ 103, 104). In some cases the same acts may sustain a conviction of either offense (cf. *People* v. *Jensen*, 392 Ill. 72; *People* v. *Schwabauer*, 369 Ill. 261). Distinction between the two offenses would then turn upon intent. But whether the difference in petitioner's case could be shown to lie in the acts proved or in the intent they might disclose, the distinctions are subtle. Which of them, if any, petitioner could urge successfully on the facts here[2] only the practiced eye of competent counsel could perceive. That perception assumes crucial

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[1] Entirely apart from thus asserting his innocence, petitioner might have been subject to commitment, rather than conviction and imprisonment, under Ill. Rev. Stat. (1937), c. 38, §592, which provides that a person who is found by a special jury impanelled for the purpose to be "insane or feebleminded" at the time of the trial, is to be committed to the Department of Public Welfare until he has recovered, when he is to stand trial. (See also, Ill. Rev. Stat. (1937), c. 38, § 593; compare *People* v. *Varecha*, 353 Ill. 52). But 'The duty and responsibility of raising the question whether the defendant was insane at the time of the trial rests upon him and his counsel. It is not the duty of the court * * * " (*People* v. *Hart*, 333 Ill. 169, 173; *People* v. *Reck*, 392 Ill. 311). And the test of insanity is not the same here as it is when urged as a defense (*cf. People* v. *Geary*, 298 Ill. 236). Argument is hardly necessary to establish that without counsel it is impossible for a defendant to raise that question or prove his rights under the statute.

[2] It is not irrelevant in this connection that in 1926, in Chicago, of 114 persons charged with felonious sex offenses of one sort or another, 23 were convicted, 10 for the misdemeanor of contributing to delinquency (Illinois Crime Survey, *supra*, p. 313).

significance when it is understood that petitioner could not, under Illinois law, have been convicted on both counts of the indictments. The essence of the attempt charge is failure. Successful completion of the offense makes impossible conviction for the attempt (*People* v. *Lardner*, 300 Ill. 264; compare *People* v. *Crane* with *People* v. *Peck*, *supra*). In pleading guilty petitioner gained nothing and gave up every chance of establishing either his innocence of any offense, or his guilt of only a lesser offense. Without counsel he could not even know of these opportunities, much less pursue them.

Finally, if petitioner believed he had no defense, there was still another course open to him under the law of Illinois. As in other states,[1] the prosecuting authorities in Illinois not uncommonly accept a plea of guilty to a lesser offense.[2] The frequency with which such pleas are

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[1] The available data suggests that the Illinois practice lies between the extremes found in other States. Expressed as a percentage of all persons charged with serious crime, pleas of guilty to a lesser offense were accepted in approximately 13% of the Illinois cases in 1926, 8% of the Cleveland cases in 1919, 6% of the Missouri cases in 1922-24, and 47% of the New York City cases in 1938. (See Illinois Crime Survey, *supra*, p. 207; Criminal Justice in Cleveland, Reports of the Cleveland Foundation (1922), pp. 237, 322; Missouri Crime Survey, Report of the Missouri Association for Criminal Justice (1926), pp. 315, 319; Twelve Months of Crime in New York City, Report of the Citizens Committee on the Control of Crime (1938), pp. 8-9.)

[2] In 1926, the only year for which relevant statistics can be found, 28.6% of all persons found guilty of crime in 8 counties similar in character to LaSalle County were so found on pleas to a lesser offense. This compares with an average of 28.31% for the State as a whole (See Illinois Crime Survey, *supra*, p. 261).

Convictions of lesser offenses in Chicago are shown to have been rendered in almost 50% of the felonious sex charges where guilt was established. Of 114 accusations only 23 were convicted, of which 11 were for lesser offenses (Illinois Crime Survey, *supra*, pp. 312-313). Compare acceptance of even larger proportions of pleas to lesser offenses when the crime here involved is charged in New York. See The Problem of Sex Offenses in N. Y. City, Report of the Citizens Committee on the Control of Crime (1938), p. 21; Report of Mayor's Committee for Study of Sex Offenses in New York City (1940), Ch. III, IV, which covers the period 1930-1939.

accepted points inexorably to the conclusion that in the administration of the criminal law, accusations, even of crimes as socially irritating as that here charged, are not infrequently bottomed upon evidence which the prosecutor is not confident the community would accept as sufficient in the particular case to merit the harsh penalties the statutes impose. That petitioner, upon whose record there is not the slightest suggestion of previous contact or familiarity with the operation of the criminal law, required the assistance of counsel to develop and present such mitigating elements as might have induced the acceptance of a plea to a lesser offense cannot be doubted.

In short, petitioner was faced with a charge which by its very making created an ominous atmosphere of "passion or prejudice" (*People* v. *Freeman, supra*). Wholly apart from any need he may have had for technical skill, he required the calm and dispassionate advice of an unaffected third party. Of his own knowledge, he could not tell whether whatever he had done subjected him to any punishment, to punishment for the crime charged or to punishment for a lesser offense. If he were innocent—either in law or in fact—he had neither the knowledge nor the skill to establish it on trial; if he were guilty only of some lesser offense, he could neither know it nor assert it without trained assistance; if he were entitled to commitment rather than conviction, he required a third person's informed intervention; and if he were to claim the opportunity, regularly accorded to others, to plead guilty to a lesser offense, he needed the assistance of someone "learned in the art".

If by the nature of the charges against him, petitioner required the assistance of counsel, the circumstances of his arraignment disclose no amelioration of that need. The skeletal common law record contains scant information as to what transpired at the arraignment. But, if the judge's minutes do not imply a curt, unquestioned and unquestioning conviction of petitioner, they certainly do

not suggest that either the judge or the prosecuting attorney displayed any concern for his lack of counsel or any effort to accord him such careful consideration as might therefore be his due.

The conclusion that petitioner thus required legal aid and advice in order to know whether and how to defend is not weakened by anything found by the Supreme Court of Illinois (compare *Betts* v. *Brady*, 316 U. S. 455, 472). On the contrary, the opinion of that Court does not disclose the slightest awareness of the express admonition that "There are situations when justice cannot be administered unless persons charged with crime are defended by capable and responsible counsel" (*Carter* v. *Illinois*, 329 U. S. 173, 179), or that "in the circumstances of a 'particular situation', assignment of counsel may be 'essential to the substance of a hearing' as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence" (*Foster* v. *Illinois*, 322 U. S. 134, 137).[1] In view of its erroneously narrow conception of the State's constitutional duty, it made no effort of any kind to measure petitioner's claim by the test of his need.

Nor does anything either said or held in *Foster* v. *Illinois* detract from the conclusion here reached. We do not read that decision to rule that Foster and Payne were not in need of legal assistance to make their defense, or that if they were, it was not their constitutional right to have such assistance assigned. We understand it to hold that because they were presumed to have been advised as to their right to counsel, their failure to enjoy the right was the result of their voluntary determination to dispense with it, and therefore their conviction was not obtained in violation of the Fourteenth Amendment. If, however, we misread the opinion, we respectfully submit

[1] See *People* v. *Easter*, 398 Ill. 430, 431, for a similar ruling by the Supreme Court of Illinois citing this Court's decision in *Foster* v. *Illinois*.

that the need of petitioner in this case for trained assistance was significantly greater than that of Foster and Payne. To be sure they were faced with difficult questions in responding to their indictment. But so was petitioner. And in addition, here, both the decision as to how to respond and the process of making the defense depend vitally upon a careful appraisal of evidence and the ability to present it effectively. Whatever might be presumed about the capacity of two men of "ordinary intelligence" to defend against a charge of burglary (*Betts* v. *Brady*, 316 U. S. 455), it plainly is impossible for anyone but an experienced trial lawyer adequately to defend a single accused against a charge such as is here levelled, whether the defendant's need is to choose a defense or to "put his case effectively in court" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279).

II

Petitioner did not waive the assistance of counsel to which he was entitled.

If petitioner was thus entitled to assignment of counsel in order to meet the accusation against him, his conviction without such appointment deprived him of his liberty without the due process of law which the Fourteenth Amendment commands, unless he voluntarily dispensed with such assistance. Petitioner submits that he did not waive the assistance of counsel to which he was entitled.

First: The Constitution, as we have noted, does not compel an accused either to defend against a charge of crime, or to seek or accept legal assistance for which he feels neither the need nor the desire. But, while it leaves him free, if he chooses, to plead guilty, it requires that he be offered a fair choice. And it is of the essence of such a choice that he who chooses knows that there are alterna-

tives from which to select. If the defendant is not "fully advised of all its implications and capable of understanding them", his plea of guilty is not competently made (*Carter* v. *Illinois*, 329 Ill. 173, 174; cf. *DeMeerleer* v. *Michigan, supra; Von Moltke* v. *Gillies*, No. 73, Oct. Term, 1947). Hence, although he need not have "the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt" (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 277), before such an admission can fairly be accepted a layman must be informed, or at least be aware, of his right to make a defense.

Where, by definition, the assistance of counsel is essential to his right to make a defense, the ordinary layman plainly is not fully aware of the implications of his plea of guilty if he does not understand that such assistance will be furnished as part of his opportunity to defend (cf. *Rice* v. *Olson*, 324 U. S. 786). The narrowest premise upon which an accused is entitled to assignment of counsel is that he does not know what defenses are open to him and would be unequipped to pursue them even if he knew. It may not be going beyond the outer edges of "essential fairness" (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 279, but compare *Von Moltke* v. *Gillies, supra*) to hold that in such ignorance he is making a free and intelligent choice when he decides to plead guilty, especially if his ignorance is a function of incompetence "in the science of law" rather than of "feeblemindedness, illiteracy, or the like" (cf. *Powell* v. *Alabama*, 287 U. S. 45, 69, 71). But the "opportunity to be heard" is a chimera if in the proved condition of such ignorance he is to be permitted to plead without having the slightest understanding that legal advice will be provided for him if he cannot afford to procure his own counsel.

In clear recognition of this, only recently this Court observed that the essential purpose of the Sixth Amendment is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional

rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution" (*Johnson* v. *Zerbst*, 304 U. S. 458, 465). Repeatedly, therefore, it has insisted that to be effective, surrender of the right must be made not only voluntarily (*Walker* v. *Johnston*, 312 U. S. 275), but "with eyes open" (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 279; *Von Moltke* v. *Gillies*, *supra*).

If that is true under the Sixth Amendment, the demonstrated need for help, which alone brings the right into being under the Fourteenth Amendment, plainly requires the accused to know of his right, if not to enjoy its fruits, before his plea can be accepted or his conviction sustained (*Rice* v. *Olson*, 324 U. S. 786). To be "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U. S. 458, 464) an accused's decision to dispense with the aid that is "essential to the substance of a hearing" must be made with "full knowledge of his rights and capacity to understand them" (*U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220, 221). Without doubt, when aware of his right, the accused is not obliged to seek the assistance of counsel. But before he can competently forego it, he must know of its availability.

Second: While, at least in a collateral attack upon a federal conviction, the burden is on the accused to prove that he did not competently dispense with the assistance of counsel (*Johnson* v. *Zerbst*, 304 U. S. 458, 468), the import of the decisions here is that he sustains that burden if there is no suggestion in the record from which it can be inferred that he was aware of his right. If there is any evidence to show, however weakly, that he knew of the availability of assistance, it is possible to infer from his silence that he voluntarily and intelligently declined it, and the burden is on him to show otherwise. But if there is no suggestion that he knew of it, to infer waiver from silence would be to presume that very "acquiescence in the loss of

fundamental rights" which this Court has consistently refused to do (*Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U. S. 292, 307). The narrowest, if not the only, meaning of indulging "every reasonable presumption against waiver" of the assignment of counsel (*Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Von Moltke* v. *Gillies, supra; Glasser* v. *United States,* 315 U. S. 60, 70, and compare *Hodges* v. *Easton,* 106 U. S. 408, 412) is that the absence of any evidence from which knowledge of his right can be inferred implies that the accused was ignorant of it; and, therefore, intelligent surrender of it cannot be inferred. And certainly, the rigorous test of waiver upon which this Court relied so heavily for the result in *Patton* v. *United States,* 281 U. S. 276, and *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, does not suggest that less than some evidence, however meagre, of the accused's awareness of his right will suffice to find it waived.

Every consideration that underlies the requirement of "express" consent to sustain a finding of waiver of jury trial in criminal (*Patton* v. *U. S.,* 281 U. S. 276; *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269) or civil (compare *Hodges* v. *Easton,* 106 U. S. 408) cases applies with at least equal force where assignment of counsel, even under the Sixth Amendment, is concerned. Not only as a general matter is the assistance of counsel more essential than a jury trial to the concept of a fair hearing (cf. *Palko* v. *Connecticut,* 302 U. S. 319, 325, 327; *Snyder* v. *Massachusetts,* 291 U. S. 97, 116), but the ground upon which it is predicated is the ignorance of the accused. The premise that calls the right into being demands some evidence of the defendant's appreciation of its existence before he can be found to have waived it (*Johnson* v. *Zerbst, supra*). And where, as under the Fourteenth Amendment, the assignment of counsel is required only because it is proved in the particular case to be "essential to the substance of a hearing," by that very proof the accused has borne "the burden of showing essential unfairness * * *, not as a mat-

ter of speculation but as a demonstrable reality". The right to assignment of counsel established in such a context can hardly be less "jealously guarded" (cf. *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 280, 281) than the right under the Sixth Amendment, which exists "in every case, whatever the circumstances" (*Foster* v. *Illinois, supra*) or the right to jury trial, which is not essential to "a fair and enlightened system of justice" (*Palko* v. *Connecticut*, 302 U. S. 319, 325).

However implicit may be such a requirement under the decisions here, petitioner does not contend that waiver of the assistance of counsel can only be effective if it "appears affirmatively" on the face of the record. He does not urge that an accused's competent consent to surrender his right must be explicitly set forth in the record or that his consent can only be inferred if the record shows that the trial judge expressly advised him as to his right, or that, in fact, the trial judge must always proffer such advice. Less than such evidence, albeit more than the mere fact of a plea of guilty (*Rice* v. *Olson, supra*) may suffice to sustain the inference that the accused knew of his right to assistance of counsel and, therefore, by his silence voluntarily surrendered it.[1] Indeed, in cases coming here from State courts, if the local law is construed by the State courts to obligate the trial judge to inform an accused of his right to assignment of counsel, possibly such obligation may be enough, without any record showing that it was performed, to sustain the inference that petitioner was

[1] See e.g. *Fairce* v. *Amrine*, 154 Kans. 618; *Hill* v. *Hudspeth*, 161 Kans. 376, cert. den. 329 U. S. 756; *Willey* v. *Hudspeth*, 162 Kans. 516 (The trial judge stated it was his regular practice to advise defendants of their rights); *Michener* v. *Johnston*, 141 F. (2) 171, 146 F. (2) 129 (C. C. A. 9), cert. den. 324 U. S. 874 (The U. S. Attorney had advised the defendant of his rights); *Logan* v. *Johnston*, 28 F. Supp. 98 (N. D. Cal.), appeal dismissed 108 F. (2) 1016 (C. C. A. 9) (The defendant bargained for a lesser plea); *Ex parte D'Elia*, 51 F. Supp. 542 (E. D. Ky.) (The defendant previously had been indicted upon similar charges, and had been assisted by counsel); see also *State* v. *Garcia*, 47 New Mexico 319.

aware of his rights and waived them by silence or a plea of guilty.[1] But if there is no evidence, however miniscule—either in fact or in State law—to suggest that the accused knew of his right to appointment of counsel, petitioner submits an accused cannot be found to have waived it.

THIRD: Whether there is such evidence, either of law or of fact, will depend, "in each case, upon the particular facts and circumstances surrounding that case" (*Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Rice* v. *Olson, supra*). When, as appears to be the most usual practice, the question of waiver is presented on collateral attack[2]—whether in a state or federal court—the tribunal in which the attack is launched may take evidence in addition to that contained in the record of the conviction in order to resolve the question. The issue here will be the correctness of the decision reached on the narrow question of waiver by the court which examined the evidence appearing in the record on review. When, however, the question of waiver is raised on direct attack—i.e., by appeal or other direct review of the conviction[3]—there is no opportunity for evidence, beyond that already in the record, to be presented to the trial court. There is also small likelihood that the question of waiver will have been resolved explicitly by that court. Accordingly, unless additional evidence may be presented on review, the reviewing court is confined to those facts appearing of record or which it may judicially notice. And it will rarely have the benefit of the explicit conclusions of the judge who heard those facts.

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[1] See e.g. *In re Application of Loundagin*, 129 Ore. 652; *State* v. *Lillie*, 172 Ore. 194, 205; *State* v. *Scofield*, 129 Wash. 295; compare *State ex rel. Drankovitch* v. *Murphy*, 248 Wis. 433; *Harris and May* v. *State*, 203 Ind. 505; *Knox County Council* v. *State ex rel. McCormick*, 217 Ind. 493, 511.

[2] See e.g. *Canizio* v. *New York*; *Tomkins* v. *Missouri*; *Rice* v. *Olson*; *DeMeerleer* v. *Michigan*; *Johnson* v. *Zerbst, supra*; *Cochran* v. *Kansas*, 316 U. S. 255; see also cases cited note 1, *supra*.

[3] See e.g. *Patton* v. *United States*; *Carter* v. *Illinois, supra*.

The situation here presented is a singular species of the latter genus. The record not only contains no decision on the question of waiver by the trial court, but, by the restrictions of Illinois law, it is unhappily thin in evidence as to what manner of man the defendant was, or what transpired at his arraignment. That, of course, does not alter the duty of this Court. Whether this case comes here by way of collateral attack or on direct review, the question is the same: Is there any suggestion that petitioner knew of his right, so that waiver might be inferred from his silence? And while light may be shed by the rulings of the courts below, the answer must be found in the record presented to this Court—however sparse it may be.

It is no answer, particularly in a proceeding coming here from a State court, to suggest that there might be available for the petitioner some other procedure for making his claim on a more complete record. That no other procedure was available to him under Illinois law in 1946, hardly can be doubted in view of the decisions of the Illinois courts [1] and the position theretofore apparently taken by its Attorney General.[2] Whether any other procedure is now available is a much mooted question. In spite of the recent concession of the Attorney General of Illinois in *Marino* v. *Ragen, supra,* the latest utterances of the Illinois Supreme Court appear plainly to confine petitioner to the

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[1] Habeas corpus was precluded by the decisions in *People ex rel. Swolley* v. *Ragan,* 390 Ill. 106; *People ex rel. Thompson* v. *Nierstheimer,* 395 Ill. 572; cert. den. 330 U. S. 831. The statutory writ of error coram nobis was unavailable both because of the nature of the claim made (*People* v. *Parcora,* 358 Ill. 448) and the 5-year limitation (*People* v. *Rave,* 392 Ill. 435). See also (1947) 15 Univ. of Chi. L. Rev. 107, 118-131; (1947) 42 Ill. L. Rev. 329; 35 Ill. Bar Journal 359.

[2] See e.g. briefs of respondent in *White* v. *Ragen,* 324 U. S. 760 (pp. 8-14); *Woods* v. *Nierstheimer,* 328 U. S. 211 (pp. 3-8); *Foster* v. *Illinois,* 332 U. S. 134 (pp. 13-16).

remedy here invoked.[1] And we are aware of no Illinois lower court opinions to the contrary. It is one thing, in accepting a confession of error on the merits, to accept also the unsupported concession of the Attorney General as to the law of Illinois. It is quite another to accept such an assertion as a governing principle in a case in which the petitioner may lose his right. At the very least, we may ask for some word from the courts of Illinois to support the Attorney General's position.

But, whether or not Illinois now furnishes an additional "corrective judicial process" in compliance with its duty under *Mooney* v. *Holohan*, 294 U. S. 103, there is no disputing that it plainly prescribes the procedure petitioner has chosen (*People ex rel. Thompson* v. *Nierstheimer*, 395 Ill. 572). If that procedure, adopted by petitioner in conformity with State law, does not comply with the State's notion of the most appropriate procedure for the vindication of Constitutional right, the State is free to block it off and provide a substitute which will be both more adequate for the accused and more suitable to the State's

[1] *People ex rel. Thompson* v. *Nierstheimer*, *supra*, especially when read in the light of *People ex rel. Swolley* v. *Ragen*, *supra*, renders habeas corpus inappropriate. And *People* v. *Touhy*, 397 Ill. 19, even without the explicit concession of the Attorney General in *Marino* v. *Ragen* (see Response to petition for certiorari, p. 5) renders coram nobis inappropriate more than 5 years after conviction.

That the Attorney General's views in the matter of collateral remedies may not be shared by the Illinois Courts is suggested by comparison of his position in *Marino* v. *Ragen* (see Response, p. 6) with the opinion of the Supreme Court of Illinois in *Pippin* v. *People*, 398 Ill. 128 (Sept. 18, 1947), which denied on the merits a claim apparently similar to that here made, although the wrong must have been as apparent to the trial judge there as it was here. If coram nobis is thus the appropriate channel for asserting constitutional wrongs known to the trial court but not of record, the Supreme Court of Illinois is not wholly in accord with the distinction between coram nobis and habeas corpus urged here in *Marino* v. *Ragen* by the Attorney General.

conception of the proper administration of criminal justice. Until then, petitioner's rights must be tested in the field the State provided therefor, by the standards this Court has found in the Constitution. Those standards do not, of course, differ with the differing procedural devices the State of Illinois may prescribe for the vindication of constitutional right.

FOURTH: If, in applying those standards to the record in this case, this Court is not obliged to accord petitioner any special generosity of inference from those facts which are of record, neither is it entitled to read the record more grudgingly against him than is authorized by the law of Illinois [1] or than did the Supreme Court of Illinois in this case (cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143, 147-148).

The most careful and searching examination of this abbreviated record does not reveal the smallest peg on which to hang the inference that petitioner knew of his right to have counsel assigned to him, or indeed of his right to secure his own counsel to represent him. Petitioner was a lone defendant (compare *Foster* v. *Illinois, supra*). From the record we know nothing of his training, experience or mental competence. But it is not irrelevant that in June, 1938, when he was arraigned, *Betts* v. *Brady, supra*, had not yet been decided and "even an intelligent and educated" layman could hardly know of a constitutional right which did not take relevant shape until 1945 when *Rice* v. *Olson*, 324 U. S. 786, first applied the principle of *Powell* v. *Alabama* to a non-capital case (cf. *White* v. *Ragen*, 324 U. S. 760). Petitioner is not shown to have been convicted of any prior offenses or to have served any prior penitentiary sentences—experiences which provide their own unique education in the rights of an accused (cf. *Betts* v. *Brady*). Indeed, the only information the record offers about him is the crime with which

[1] Compare *Aero Mayflower Transit Co.* v. *Commissioners*, No. 39, Oct. Term, 1947, and cases cited at note 9.

he is charged and the plea he made. Even if his plea could make the charge relevant, the accusation hardly suggests the kind of legal learning which might be inferred from an accusation charging a complicated scheme to defraud. Nor does petitioner's willingness to subject himself, by his pleas of guilty, to the maximum sentence possible on these indictments indicate even that sophistication which is implicit in an attempt to bargain with the prosecutor. In these circumstances, the only evidence to sustain the inference that petitioner knew of his rights must come from such advice as the Court or State's Attorney addressed to him.

But in contrast to other common law records in Illinois (e.g., *People* v. *McElhaney*, 394 Ill. 380; *People* v. *Davis*, 396 Ill. 432), the record here contains nothing to suggest that at any time petitioner was apprised either that he could be represented by his own counsel or that the Court would provide him with counsel if he were unable to afford it. In fact, apart from pronouncing sentence, the only advisory communications which the judge's minutes disclose that he addressed to the accused were that he "furnished [him] with a copy of the indictment, a list of witnesses and jurors herein" and "admonished and explained to . . . [him] the consequences and penalties which will result from" his plea of guilty.

Unless the record is to import instructions or advices which it does not suggest explicitly, or the single admonition explicitly recorded is to be read with an eye that sees more than can reasonably be inferred, petitioner received no enlightenment from the court as to his right to be assigned counsel. Petitioner submits that no such reading of the record is possible, and significantly, no such reading was made by the Supreme Court of Illinois in this case, or in any other case ever before it.

In determining what the judicial advice noted in this record can be said to import, we start with the rulings of the Illinois Supreme Court on the proper interpreta-

tion of the common law record. That court, over a long period of years, and in response to a wide variety of claims, has established that while such a record "imports verity, rather than an opposite conclusion that the interests of the accused were injuriously affected" (*People* v. *Street*, 353 Ill. 60, 63), it must contain at least some evidence that the rights which Illinois accords to an accused were in fact extended, if the conviction is to be sustained. Hence, where the statutes of Illinois are construed to impose an affirmative obligation upon a judge, as e.g., to admonish the accused as to the consequences of pleading guilty, the record must show performance of that duty (*People* v. *Fulimon*, 308 Ill. 235; *People* v. *Petrie*, 294 Ill. 366; *People* v. *Rusk*, 348 Ill. 218; *People* v. *Cooper*, 366 Ill. 113). To be sure, the slightest notation of such performance will be taken to import the fullest and plainest explanation the law requires.[1] But if the record does not show even a notation as to the performance of that duty, no presumption that it was performed will be indulged (*People* v. *Petrie*, 294 Ill. 366; *People* v. *Fulimon*, 308 Ill. 235; *People* v. *Benner*, 224 Ill. App. 515; *People* v. *Sweetland*, 210 Ill. App. 432; *People* v. *Kolb*, 238 Ill. App. 173; compare *People* v. *Rusk*, 348 Ill. 218, 222).

In sharp contrast to the judicial duty to admonish an accused as to the consequences of his guilty plea before accepting it, and perhaps to the judicial duty to assign counsel in a capital case (Ill. Rev. Stat. (1937), c. 38, § 730; compare *People* v. *Bernovich*, 391 Ill. 141, cert. den. 326 U. S. 798), is the Illinois conception of the judicial duty to assign counsel or to advise the accused of his right to have counsel assigned in a non-capital case (compare *People* v. *Gruhl*, 388 Ill. 52). More than twenty

[1] *People* v. *Pennington*, 267 Ill. 45; *People* v. *Siracusa*, 275 Ill. 457; *People* v. *Harney*, 276 Ill. 236; *People* v. *Throop*, 359 Ill. 354; *People* v. *De Rosa*, 362 Ill. 161; *People* v. *Williams*, 383 Ill. 348, cert. den. 321 U. S. 762; *People* v. *Fuhs*, 390 Ill. 67; *People* v. *Farris*, 392 Ill. 267; *People* v. *Corrie*, 387 Ill. 587.

years ago the Illinois Supreme Court explicitly announced that neither the State constitutional authorization for an accused to appear and defend by counsel nor the statute authorizing assignment of counsel in a non-capital case places upon the trial court "the duty to proffer the services of counsel" (*People* v. *Lavendowski*, 326 Ill. 173, 176). Since that decision, repeatedly and without qualification, it has delineated the scope of the judge's duty—whether to assign counsel [1] or to advise the accused of his right to assignment [2]—in similar terms. If anything can be said to be clear about the Illinois law in this field, it is that neither statute [3] nor Constitution obligates the judge to advise the accused of his right to assignment of counsel. Only where the accused makes an appropriate [4] request to obtain his rights, is it the judge's duty to grant them.

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[1] *People* v. *Parcora*, 358 Ill. 448; *People* v. *Childers*, 386 Ill. 312; *People* v. *Corbett*, 387 Ill. 41; *People* v. *Fuhs*, 390 Ill. 67; *People* v. *Stack*, 391 Ill. 15, cert. den. 326 U. S. 792; *People* v. *Batey*, 392 Ill. 390; *People* v. *Russell*, 394 Ill. 192; *People* v. *Creviston*, 396 Ill. 78; *People* v. *Carter*, 398 Ill. 336; *People* v. *Easter*, 398 Ill. 430; compare *People ex rel. Ross* v. *Ragen*, 391 Ill. 419, cert. den. 327 U. S. 801; see also *Pippin* v. *People*, 398 Ill. 128 (which arose on coram nobis).

Similar rulings have been made with respect to the court's duty to hear evidence in mitigation or aggravation, although that duty is contained in the same section of the statute prescribing the duty to admonish as to the consequences of a plea of guilty (Ill. Rev. Stat. (1937), c. 38, § 732; *cf. People* v. *Pennington*, 267 Ill. 45; *People* v. *Crooks*, 326 Ill. 266; *People* v. *Gerke*, 332 Ill. 583; *People* v. *Throop*, 359 Ill. 354; *People* v. *Farris*, 392 Ill. 267).

[2] *People* v. *Corrie*, 387 Ill. 587; *People* v. *Evans*, 397 Ill. 430; *cf. People* v. *Van Horn*, 396 Ill. 496, and compare *People* v. *Lavendowski*, *supra* (which is cited in the instant case) with *People* v. *Kurant*, 331 Ill. 470.

[3] Compare recent efforts to amend Ill. Rev. Stat. (1937), c. 38, § 730, to compel the trial judge to advise defendants of their right to appointment of counsel (Senate Bill No. 349, 65th Gen. Ass.).

[4] See e.g. *People* v. *Van Horn*, 396 Ill. 496.

It is for this reason that in meeting claims of denial of counsel the Illinois Supreme Court invariably couches its opinion in terms of the scope of the judge's duty and finds or presumes that the trial court "discharged its duty to the defendant in all respects" (see e.g., *People* v. *Fuhs,* 390 Ill. 67, 68; *People* v. *Corbett,* 387 Ill. 41, 43) rather than that he advised, or is presumed to have advised, the accused of his right to assignment of counsel. Since the record shows no appropriate request by the accused, and the record "imports verity", the presumption is that no such request was made,[1] and the trial court therefore "did not deny a request for the services of counsel" (*People* v. *Parcora,* 358 Ill. 448, 451; cf. *People* v. *Gruhl,* 388 Ill. 52). Any doubt as to the meaning of the presumption was dispelled only recently in *People* v. *Van Horn,* 396 Ill. 496, 498, where the record showed the accused to have said he "wants * * * a lawyer", and the Supreme Court ruled that since the record did not show a request for assignment under oath "it will be presumed that the court discharged its duty to the defendant in all respects." See also *People* v. *Brown,* 397 Ill. 529, 531.

In short, in Illinois the scope of the duty is the measure of the presumption accorded by the Supreme Court. Where there is a duty to act affirmatively, its discharge is not presumed without some record notation. Where there is a duty to act only upon an appropriate request, its discharge is presumed because the record shows no appropriate request (*People* v. *Brown,* 397 Ill. 529, 531). Hence, as a matter of Illinois law where, as here, there is no notation of instruction as to the right to counsel, it is not presumed that the instruction was given.

The only notation in this record is that with respect to admonishing the accused as to the consequences of pleading guilty. This notation, the Illinois courts would

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[1] *People* v. *Braner,* 389 Ill. 190, cert. den. 324 U. S. 875; *People* v. *Stubblefield,* 391 Ill. 609; *People* v. *Pond,* 390 Ill. 237, cert. den. 326 U. S. 749; *People* v. *Creviston,* 396 Ill. 78; *People* v. *Russell,* 394 Ill. 192; *People* v. *Corbett; People* v. *Corric; People* v. *Fuhs.*

presume to evidence the fullest and plainest explanation which the State law requires as to the implication of the plea.[1] But, although such an explanation appears to include advice as to the right to a jury trial (*Krolage* v. *People*, 224 Ill. 456, 458-459; *People* v. *Wilke*, 390 Ill. 598; cert. den. as untimely, 327 U. S. 779; and compare *People ex rel. Swanson* v. *Fisher*, 340 Ill. 250; *People* v. *Washington*, 397 Ill. 122), it has never been suggested that it includes advice as to the right to counsel. On the contrary, repeatedly, when the claim was made that advice as to the right to counsel had not been tendered, although the record necessarily recited that the accused had been admonished as to the consequences of the plea of guilty, the Illinois Supreme Court has either conceded that "so far as the record shows" there had been no such advice (*People* v. *Lavendowski*, 326 Ill. 173, 177) or ruled simply that there was no obligation to give such advice (see e.g. *People* v. *Evans; People* v. *Corrie;* cf. *People* v. *Van Horn, supra,* and compare *People* v. *Davis,* 396 Ill. 432, 434). Not once in those cases did it suggest that the admonition as to the consequences of pleading guilty, which it explicitly presumed to have been given fully and adequately (see e.g. *People* v. *Corrie, supra*) embodied any explanation as to the right to counsel. And the reason for this is plain—there is no duty in Illinois, statutory or otherwise, to advise an accused as to that right.

Accordingly, if Illinois law is to control the reading of this record, this Court is compelled to conclude that petitioner received no advice of any sort with respect to his right to assignment of counsel, or indeed his right to procure counsel of his own choice. In contrast to the question which would be presented if Illinois law commanded a trial judge to advise a defendant of his right to assignment of counsel and the Illinois courts "presumed" that he had done so (see e.g. *In re Application of Loundagin,*

[1] See e.g. *People* v. *Siracusa, People* v. *Harney, People* v. *Williams, People* v. *Fuhs, supra.*

129 Oregon 652; *State* v. *Scofield*, 129 Wash. 295; and compare *Haley* v. *Ohio*, No. 51, Oct. Term, 1947), here the only question is whether this Court will presume what the State law does not require, and the State courts carefully and calculatedly refrain from presuming.

FIFTH: Wholly apart from how, as a general matter, the law of Illinois might require this Court to interpret the record, the ruling of the Illinois Supreme Court in this case discloses that it did not either presume or find from the record presented to it that petitioner had received any advice as to his right to counsel or otherwise knew of it. In plain language it said: "* * * [In] the absence of a request, there was no duty upon the court to appoint counsel * * *. We have repeatedly held that the right to representation by counsel is personal to a defendant and may be waived or claimed as he himself elects, and that no duty rests upon the court to provide legal assistance for an accused unless he states upon oath his inability to procure counsel * * *. Nor is there any requirement, constitutional or statutory, that the court advise defendant of his rights under the statute. Furthermore, there is no requirement that the waiver of the statutory right to counsel appear on the face of the judgment order." On that assumption no finding that petitioner had been advised or knew of his right was necessary.

To be sure, the Court made no explicit finding that he had not been advised of his right. But that is simply to say that it did not spell out in black and white a finding which permeates every paragraph of its opinion, but which nothing in its authoritative conception of Illinois law required it to state explicitly (see *People* v. *Brown*, 397 Ill. 529, 531, citing the instant case).

Nor did that court find that petitioner otherwise knew of his right to counsel. It predicated its conclusion of waiver upon the assumption that the absence of a re-

quest for counsel was sufficient to establish waiver.[1] We have shown that under the decisions here that is an unduly narrow conception of the standards by which a competent surrender of constitutional right must be tested (compare also *Rice* v. *Olson, Tomkins* v. *Missouri, Powell* v. *Alabama, supra*). Applying an erroneous standard, the Supreme Court of Illinois did not find the facts which are required by the test here established. And there is nothing in Illinois law from which to presume such facts, if, indeed, such a presumption could foreclose inquiry here (compare *Haley* v. *Ohio*, No. 51, October Term, 1947). Hence, nothing in this record or in Illinois law leaves room for a finding here of the constitutionally significant facts which the Supreme Court of Illinois did not find (cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143).

SIXTH: As we read the Illinois decisions, the explicit notation in the record of instructions as to an accused's "rights of Trial" neither independently imports advice as to his right to counsel nor signifies more than is contained in the admonition as to the consequences of pleading guilty. Accordingly, we submit that this Court, possibly in deference to the suggestion contained in the brief of the State (p. 14), gave a larger content to the record in *Foster* v. *Illinois* than the Illinois decisions justify. However, if we misread those decisions, we submit that this case stands upon a different footing than the *Foster* case. Even if the instruction as to an accused's "rights of Trial" could be found to import advice as to the right to assignment of counsel, no such instruction is noted in this record. And here, more plainly than in Foster's

[1] See e.g. *People* v. *Reynard*, 397 Ill. 244; *People* v. *Evans*, 397 Ill. 430; *People* v. *Corbett*; *People* v. *Corrie*; *People* v. *Braner*; *People* v. *Russell*; *People* v. *Stack*; *People* v. *Pond, supra*. Compare the more rigorous test of waiver prescribed by Illinois where the statutes are construed to impose upon the judge an affirmative duty to advise an accused of his rights. *People ex rel. Swanson* v. *Fisher*; *People* v. *Washington*; *People* v. *Corrie*.

case, the Illinois Supreme Court did not purport to find or presume any advice as to the right to counsel.

If the trial court did not inform petitioner of his right to assignment of counsel, and neither the record nor Illinois law contains anything from which it can possibly be inferred that petitioner knew of his right, manifestly his failure to enjoy the right cannot be due to his having made his choice "with eyes open". Only by "presuming" the conclusion can he be found, on this record, to have intelligently and understandingly surrendered his right. The Illinois Supreme Court did not presume an intelligent and understanding waiver. There is even less reason for this Court to do so (*Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 293, 307).

CONCLUSION

Due process of law under the Fourteenth Amendment entitled petitioner to the assignment of counsel to meet the accusation here levelled. He neither received nor waived the assistance to which he was thus entitled. His conviction was therefore obtained without due process of law. Petitioner respectfully submits that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

VICTOR BRUDNEY,
Attorney for Petitioner.

January, 1948.

APPENDIX

Constitution of the United States, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois (1870), Article Two, Section Nine:

In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witness face to face, and to have process to compel the attendance of witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Illinois Revised Statutes (1937), Chapter 38:

109. Crimes against children—Penalty.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any person of the age of seventeen years and upwards who shall take, or attempt to take, any immoral, improper or indecent liberties with any child of either sex, under the age of fifteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who

shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or any such person who shall take any such child, or shall entice, allure or persuade any such child, to any place whatever for the purpose either of taking any such immoral, improper or indecent liberties with such child, with said intent, or of committing any such lewd or lascivious act upon or with the body, or any part or member thereof, of such child with said intent, shall be imprisoned in the penitentiary not less than one year nor more than twenty years: Provided, that this Act shall not apply to offenses constituting the crime of sodomy or other infamous crimes against nature, incest, rape or seduction.

103. Delinquent child defined.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That for the purposes of this Act a delinquent child is any male who while under the age of seventeen (17) years, or any female who while under the age of eighteen (18) years violates any law of this state; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequents a house of ill repute; or knowingly frequents any policy shop or place where any gambling device is operated; or frequents any saloon or dram-shop where intoxicating liquors are sold; or patronizes or visits any public pool room or bucket shop; or wanders about the streets in the night time without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority; or uses vile, obscene,

vulgar, profane or indecent language in any public place or about any school house; or is guilty of indecent or lascivious conduct.

104. Penalty.] § 2. Any person who shall knowingly or wilfully cause, aid or encourage any male under the age of seventeen (17) years or any female under the age of eighteen (18) years to be or to become a delinquent child as defined in section one (1), or who shall knowingly or wilfully do acts which directly tend to render any such child so delinquent and who, when able to do so, shall wilfully neglect to do that which will directly tend to prevent such state of delinquency shall be deemed guilty of the crime of contributing to the delinquency of children and on conviction thereof shall be punished by a fine of not more than two hundred (200) dollars, or by imprisonment in the county jail, house of correction or workhouse not more than one (1) year, or by both such fine and imprisonment.

590. Sound mind.] § 10. A person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity, and who hath arrived at the age of fourteen years, or before that age if such person know the distinction between good and evil.

592. Insanity.] § 12. An insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged: Provided, the act so charged as criminal shall have been committed in the condition of insanity. If, upon the trial of a person charged with crime, it shall appear from the evidence that the act was committed as charged, but that, at the time of committing the same, the person so charged was insane, the jury shall so find by their verdict, and by their verdict shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in

case the jury shall find such person has not entirely and permanently recovered from such insanity, the court shall commit such person to the Department of Public Welfare. But in case the jury shall find by their verdict that such person has entirely and permanently recovered from such insanity, he shall be discharged from custody. If after commitment such person in a subsequent hearing before a jury shall be determined by verdict to have entirely and permanently recovered from such insanity, he shall likewise be discharged from custody.

If a person be charged by indictment with the commission of a felony, and if before trial the judge before whom said cause is pending shall, in accordance with the law, impanel a jury to ascertain before a plea whether or not said person is insane or feebleminded, and if said jury so impaneled shall by their verdict determine that said person was at the time of the impaneling of said jury either insane or feebleminded, then the court shall commit such person to the Department of Public Welfare. If on such hearing before trial, or upon any hearing subsequent to commitment, the jury shall determine that a defendant is not insane or feebleminded, or has permanently recovered from such insanity or feeblemindedness, then such person shall be subject to trial for the offense with which he is charged by indictment. . . .

593. Becoming insane.] § 13. A person that becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. If, after the verdict of guilty, and before judgment pronounced, such person become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all

of these cases, it shall be the duty of the court to impanel a jury to try the question whether the accused be at the time of impaneling, insane or lunatic.

730. Counsel—Fees for indigent defendant.] § 2. Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private.

Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants. • • •

732. Plea of guilty explained.] § 4. In cases where the party pleads "guilty," such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea; after which, if the party persist in pleading "guilty," such plea shall be received and recorded, and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 398

ROY BUTE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

RESPONDENT'S STATEMENT OF THE CASE.

On June 17, 1938, two indictments were returned in the Circuit Court of La Salle County, Illinois, each charging the defendant with the crime of taking indecent liberties, and with the crime of attempting to take indecent liberties, with a female child. The first of these indictments named as the child one Irene Reeland, alleged to be eight years of age. (R. 5-6.) The second named as the child one Dorothy Reeland, alleged to be aged eleven years. (R. 10-11.)

Each indictment consisted of two counts, the first count charging the substantive offense and the second charging the attempt.

Since one of the considerations urged upon this Court by counsel for petitioner is based upon the supposed complexity of the charges and the supposed technicality of the diction in which they were couched, we quote the full text of the first indictment (R. 5-6):

> Of the June Term of the La Salle County Circuit Court, in the year of our Lord 1938.
>
> The Grand Jurors, Chosen, selected and sworn, in and for the County of La Salle, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards, did then and there unlawfully and feloniously take certain immoral, improper and indecent liberties with a certain female child under the age of fifteen (15) years, and of the age of eight (8) years, to-wit, Irene Reeland, with intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.
>
> And the Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of La Salle aforesaid, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present: That the said Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards did then and there unlawfully and feloniously attempt to take certain immoral, im-

proper and indecent liberties with a certain female child under the age of fifteen (15) years and of the age of eight (8) years, to-wit, Irene Reeland, by then and there taking down the pants of the said Irene Reeland and attempting to play with the private parts of her the said Irene Reeland, with the intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute, but that he, the said Roy Bute, failed in his said attempt, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

(Signed) Taylor E. Wilhelm, State's Attorney in and for said County of La Salle.

The indictments charged the Illinois statutory crime commonly referred to as "taking indecent liberties with children" defined, prohibited and punished by the Illinois Criminal Code (Ill. Rev. Stats. 1937, Ch. 38, par. 109, p. 1105, printed in full, *Petitioner's Brief*, pages 39-40).

The indictment in the second case is substantially identical with the indictment in the first case, except that the name of the alleged victim is Dorothy Reeland, instead of Irene Reeland, and her age is fixed at eleven years. (R. 10-11.)

On June 20, 1938, petitioner waived trial by jury and pleaded guilty to each indictment.

The full text of the arraignment and plea of guilty in the first case is as follows (R. 7-8):

ARRAIGNMENT AND PLEA OF GUILTY—June 20, 1938

Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.

And the said defendant being now arraigned before the bar of this Court moves the Court for leave to

enter his plea of Guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.

[Fol. 19] Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.

Thereupon the Court finds the age of the said defendant to be fifty-seven (57) years.

The full text of the arraignment and plea in the second case is in identical language except that the case number is 40159 instead of 40158.

Upon the pleas thus entered, the court entered judgment convicting petitioner and sentencing him in each case to the indeterminate sentence of not less than one nor more than twenty years which was mandatory, under the then applicable Illinois statute (Ill. Rev. Stats. 1937, Ch. 38, par. 802, p. 1212) for the substantive offense of taking indecent liberties. The sentences were to run consecutively. (R. 13.) The charges of "attempting to take indecent liberties" were *nolled* on motion of the State's Attorney. (R. 9, 13.)

The record is silent in all respects concerning the matter of counsel for petitioner.

These are all of the facts apparent upon the record. There are no others. Any conclusion of fact, favorable either to petitioner or to Illinois, that might be pertinent to any of the questions raised by petitioner must necessarily be a conclusion drawn by presumption, inference or conjecture.

SUMMARY OF ARGUMENT.

I.

There is no categorical federal constitutional right to the appointment of counsel in non-capital state cases. Special circumstances may require such appointment in particular cases. But such circumstances will not be presumed or inferred merely from a plea of guilty to a simple charge.

Foster v. *Illinois*, 332 U. S. 134;
Adams v. *United States*, 317 U. S. 269;
Betts v. *Brady*, 316 U. S. 455.

II.

The record fails to show or to support a fair inference that petitioner had special need of counsel. Therefore the record does not sustain a charge of denial of due process of law.

There are no special circumstances apparent upon the record that would distinguish this case, in point of any principle of constitutional law, from thousands of similar cases in which defendants plead guilty to simple and common crimes, including sexual offenses.

The case can not be dissimilated in principle from *Foster* v. *Illinois*, 332 U. S. 134.

The contention that the mere charge of a sexual offense raises an inference of mental incompetence, either such as to render the offense a crime or such as to render the accused incapable of pleading to the accusations, when no such

general principle is enunciated as to crimes against property (*Foster* v. *Illinois*, 332 U. S. 134; *Betts* v. *Brady*, 316 U. S. 455; *Adams* v. *United States*, 317 U. S. 269) would be to divine from the due process clause, as a general constitutional precept, a different rule in sex cases from that which obtains in other cases. So to deduce such a rule would not, we submit, serve either the common understanding or the constitutional scholar's reading of the due process clause.

The suggestion that petitioner may have been intoxicated is without foundation in the record. It would have been equally available in the *Foster* case.

The suggestion that the charge engendered public hostility is without support in the record. Even if it did engender such hostility, there is nothing to show that that fact alone disabled the petitioner from making a simple and voluntary acknowledgment of his guilt.

The suggestion that petitioner may have been denied the right to plead guilty to a lesser offense, which right counsel might have obtained for him, was explicitly made and implicitly rejected in the *Foster* case. If petitioner's admission of the acts charged is otherwise sufficient despite the absence of counsel, he was not prejudiced because he might have been able to plead guilty to a lesser offense; for certainly there can be no constitutional right to be convicted of a crime lesser than that which has been admittedly perpetrated.

The act charged was simple in its nature. The accusation was in readily understandable English. Therefore the charge presented no "special circumstance" that would entail the necessity for the appointment of counsel under the federal due process clause.

In every case in which this Court has held that the accused was entitled to counsel in a State case, special circumstances have either been proved or assumed from undenied allegations.

III.

If particular circumstances, such as petitioner's mental instability, required the appointment of counsel, other remedies, original and not appellate in nature of office, are available and appropriate.

Hawks v. *People*, 398 Ill. 281;
Jablonski v. *People*, 330 Ill. App. 422.
Carter v. *Illinois*, 329 U. S. 173.

ARGUMENT.

I.

There is no categorical federal constitutional right to the appointment of counsel in non-capital state cases. Special circumstances may require such appointment in particular cases. But such circumstances will not be presumed or inferred merely from a plea of guilty to a simple charge.

Petitioner's counsel, with commendable fairness, concedes that

> "it now appears plain that due process of law under the Fourteenth Amendment does not command the assignment of counsel to an accused 'in every case, whatever the circumstances' (*Foster* v. *Illinois*, 332 U. S. 134, 137, compare *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275)." (*Petitioner's Brief*, p. 9.)

And counsel for petitioner correctly appraises

> "the decisions here since *Powell* v. *Alabama*, 287 U. S. 45"

when he says that those decisions

> "have measured the accused's right to assignment of counsel by his **demonstrated need** for trained assistance in appraising and defending **against the particular charges directed at him.**" (*Petitioner's Brief*, p. 9. Emphasis supplied.)

Indeed, we accept pages 9 and 10 of petitioner's counsel's brief as an excellent statement of the canon of federal due process of law with respect to the right to counsel in state criminal cases.

But from petitioner's counsel's own candid and discerning observations, as well as from the cases that he cites, it appears that a "demonstrated need for trained assistance in appraising and defending against the particular charges" is requisite before this Court will reverse a conviction, at least in a non-capital case, in the state courts.

Under Point II of this Brief, *post*, we argue that this case is indistinguishable from *Foster* v. *Illinois*, 332 U. S. 134, in any respect that would bespeak denial of due process in this case if there was no such denial in the *Foster* case. In the *Foster* case this Court sustained a conviction for burglary where the accused did not have counsel. Under this Point, however, we allude to the *Foster* and other cases only as recognizing what this Court called in the *Foster* case the "rationale of this application of due process," that is, the application of due process to the matter of counsel in state criminal proceedings.

In the *Foster* case this Court, after observing that there was "neither proof nor uncontradicted allegation of * * * miscarriage of justice in accepting pleas of guilty," said:

> "* * * We thus have in effect the bald claim that, merely because the record does not disclose an offer of counsel to a defendant upon a plea of guilty, although the court before accepting the plea duly advised him of his 'rights of Trial' and of the consequences of such a plea, he is 'deprived of rights essential to a fair hearing under the Federal Constitution.' *De Meerleer* v. *Michigan*, *supra*, at 665.
>
> **"We reject such a claim. Most incarcerations are upon pleas of guilty, and probably most such pleas have been made without the felt need of counsel. It is not for us to suggest that it might be desirable to offer to every accused who desires to plead guilty the opportunities for counsel and to enter with formality upon the record the deliberate disclaimer of his need for counsel because of a full appreciation of the meaning of a plea of guilty as expounded by responsible judges.** Our duty does not go beyond safe-

guarding 'rights essential to a fair hearing' by the States. After all, due process, 'itself a historical product,' *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31, is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the States have lived not only before the Fourteenth Amendment but for the eighty years since its adoption. It does not militate against respect for the deeply rooted systems of criminal justice in the States that such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." (Emphasis supplied.)

In *Adams* v. *United States*, 317 U. S. 269, a case that is the more incisive because not only the concept of due process but the specific guaranty of the Sixth Amendment was invoked, this Court said, at pages 276-277:

"* * * Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilty expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. * * * **And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice** * * *" (Emphasis supplied.)

In Illinois' Brief in the *Foster* case, a copy of which has been furnished counsel for the petitioner in the instant case, Illinois presented a "Study of the Right to Counsel in State Criminal Cases." That Study collected, briefly analyzed and considered comparatively the constitutional provisions, statutes and judicial decisions of the forty-eight states of the Union. And that Study demon-

strated that, as its results were summarized at page 6 in the *Foster* brief,

> "twenty-four states have directly held that there was a waiver of the right to counsel where the accused fails to request counsel. Since a few courts do not seem to have passed upon the question, it follows that a majority of states passing on the question have adopted this view."

This Court did not disturb the tradition of state jurisprudence in accordance with which pleas of guilty have long been accepted without the appointment of counsel.

The Dissenting Opinion in the Foster Case.

We pay most respectful attention to the dissenting opinion, concurred in by four members of this Court, in the *Foster* case.

We are fully sensible of the humane solicitude for the rights of accused that informs that opinion. It is therefore with the utmost deference that we submit that "since it is a constitution that we are expounding" and since constitutional due process is "itself a historical product," this Court should not substitute the judgment of its members, however enlightened and benign that judgment may be, for the view that has never, so far as we know, found dissent in the decision of any state court, namely, the view that the due process clause of the Fourteenth Amendment does not categorically require the appointment of counsel in all serious state criminal cases.

We submit that inasmuch as the Fourteenth Amendment is addressed to the States in the first instance, unanimous consensus of the decisions of state courts should be regarded as correctly interpreting the meaning of the due process clause.

Unanimous consensus on the part of state courts in expounding the federal constitution would not be authoritative if the cases were few in number. But, reported and unreported, they are legion. Thousands of prisoners have made a simple acknowledgment of guilt of simple crimes and have been sentenced without, so far as we are aware, any state court's intimation that the practice denied *federal* due process of law. This fact speaks eloquently for the meaning of the Fourteenth Amendment in this respect, even if that meaning might not commend itself to minds more than ordinarily exquisite in their sensibility of the dictates of abstract justice.

II.

The record fails to show or to support a fair inference that petitioner had special need of counsel. Therefore the record does not sustain a charge of denial of due process of law.

Petitioner's counsel recognizes, and we cannot forbear emphasis of the fact, that each time that this Court has either held or assumed on the basis of undenied allegations that a state prisoner was denied due process because of denial of counsel, it has found either in the record or in undenied charges that there were, in this Court's language in *Johnson* v. *Zerbst*, 304 U. S. 458, "in each case, upon the particular facts and circumstances surrounding that case," features specific and proper to the case itself that required the appointment of counsel. We briefly note in the margin the special facts in each case in which this Court held that facts or undenied allegations required the appointment of counsel.[1]

[1] *Rice* v. *Olson*, 324 U. S. 786: In this case the petitioner was an Indian and it was made affirmatively to appear that there was an exceedingly

Unless the court is now to depart from this *critique* of due process, special circumstances must appear in the instant record either immediately or by fair inference if denial of process is to be predicable upon the present record. Petitioner's counsel finds, but we do not find, special factors in this case excepting it from the rule of the *Foster* case.

The Contention That the Mere Charge of a Sexual Offense Raises an Inference of Mental Incompetence.

Petitioner's counsel suggests, *but the record itself does not support the suggestion*, that the mere nature of petitioner's admitted acts constituted a *caveat* to the courts below that petitioner was a person of such mental or nervous instability as to render him either innocent of the crimes charged or not ordinarily competent to defend against the state's simple accusation of simple facts.

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difficult question, involving the reconciliation of conflicting rights of sovereignty with respect to whether the *locus* of the crime was within the exclusive federal criminal jurisdiction. The court emphasized "the complexities of the problem" and found it pertinent to observe that "a decision of the state court that it had jurisdiction might not have finally determined the issue."

Canizio v. *New York*, 327 U. S. 82: In this case the defendant was nineteen years old, therefore presumed by the common law to be incapable of making even the simplest contract, and made an affirmative showing, by affidavit, that he was "unfamiliar with his legal rights." Even then the court affirmed the conviction on the ground that counsel who later represented him waived his right, if right he had, to vacate the judgment. But in discussing what the situation would have been "had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced," this court said only that "*his charge would have been such as to require the court to hold a hearing on his motion.*" The court did *not* hold that he was entitled to an *outright reversal* upon the common law record.

Tomkins v. *Missouri*, 323 U. S. 485 and the companion case, *Williams* v. *Kaiser*, 323 U. S. 471: In these cases, although the offenses were both capital, the petitioners made affirmative showings *contemplating the hearing of evidence on the issues tendered by those allegations* that they were incapable of making a defense.

Adams v. *United States*, 317 U. S. 269: The Circuit Court of Appeals issued an "auxiliary writ of *habeas corpus*" upon which writ evidence was taken *dehors* the record as to the competence of the accused to waive the right of counsel.

In order to sustain this contention of petitioner's counsel, this Court would have to read the due process clause as implying that an accused's admission of the perpetration of a sexual offense amounted, not to an acknowledgment of legal or moral guilt, but to a suggestion *prima facie* that the perpetrator was not guilty of the crime by reason of insanity or that he is presumptively incompetent to understand and plead to the charge.

Unless this Court is to overrule the *Foster* case, this Court could reverse the instant convictions only by holding that crimes against property (burglary, in the *Foster* case) or crimes against persons in which there is no overt erotic component in the intent or motivation (non-sexual assaults, mayhem, attempts at murder and the like) do not *per se* bespeak mental incompetence but that sexual offenses do bespeak such incompetence.

Powell v. *Alabama*, 287 U. S. 45: The record affirmatively showed and this court emphasized special circumstances consisting of the fact that the accused were negroes in a hostile white community, that there was substantial doubt as to their guilt, and that they were forced to trial without adequate preparation, as justifying reversal.

DeMeerleer v. *Michigan*, 329 U. S. 663: The defendant asserted his rights by a proceeding contemplating an investigation of whether, *in that particular case*, due process was denied.

House v. *Mayo*, 324 U. S. 42: Here petitioner did not complain of failure to appoint counsel but of unreasonable failure to consult with counsel whom he already had. The court said: "We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition." And it said this notwithstanding allegations of such "special circumstances" as that when petitioner was brought into court "without previous warning" and information was handed up making the charge of burglary, that he importuned the court for time to communicate and consult with an attorney whom he had already engaged, that he was "in his twenties, uneducated and a stranger in the town." In this case, with the fact undisputed that petitioner was not represented by counsel at the time of his trial, all that this court held that he was entitled to was a hearing upon his charge of denial of true process. There is no intimation that he would have been entitled to an outright reversal upon the common law record.

Marino v. *Ragen*, No. 93, October Term, 1947 (not yet reported): It affirmatively appeared from the evidence that the prisoner had been unlawfully arrested and transported from Wisconsin to Illinois, had been held incommunicado for many days before he made a confession, was eighteen years old, was unable to speak English, was given as an interpreter the officer who had taken his confession, and in addition to these facts was denied counsel. Illinois confessed error.

Whatever may be the refinements of clinical thinking upon the part of psychiatrists in this field, those refinements are not, we conceive and submit, imported bodily into the concept of "due process" so that, without any suggestion other than that arising from the general nature of a charge of sexual misconduct, an inference of insanity or other incapacity to commit an offense or to plead guilty thereto must inevitably arise from the mere fact of indictment and acknowledgment of guilt upon a sexual offense when no such inference arises from crimes against property.

In short: Since the record in the instant case is silent as to the actual facts of this case, as the record in the *Foster* case was silent as to the actual facts in that case, petitioner's counsel would urge this Court to declare, not upon the specific facts in this case but as a premise of constitutional law based upon the nature of the charge, that accusations of the genus here involved, that is, of sexual delinquency, raise a presumption different from that raised by a charge of burglary, larceny, robbery or the like.

We submit that any such ruling, if uttered as a categorical precept based upon the *type of crime* and without regard to the *specific acts, facts and circumstances of the particular case,* would be untenable.

In the *Foster* case this Court held, not that it was the specific *type* of case, but the *specific case itself* that is to be considered in appraising the "demonstrated need" of the accused for counsel. Those who acknowledge guilt of sexual offenses are not, we submit, entitled to the indulgence of presumptions more benevolent than are the inferences drawn from admissions of crimes against property or such crimes against persons as non-sexual assaults, mayhem and the like.

The Contention that Petitioner May Have Been Intoxicated.

So far as counsel's suggestion as to the possible availability of intoxication as a defense, the difficulty is that nothing in the record suggests that petitioner was intoxicated on the two occasions when he committed his molestation of the two little girls. Foster and Payne, or one of them and not the other, may have been intoxicated or otherwise mentally unbalanced at the time that they committed the acts charged in their indictments. But this Court indulged no such inference. Nor is there any basis (except the purest and veriest conjecture) for such an inference in this case.

We conceded in the *Foster* case that circumstances *could* exist which would render the question of burglary *vel non* an extremely abstruse one.[2] The same *might* be true of the statutory crime of taking indecent liberties. But nothing suggests that it is true in the instant case.

The Contention that the Charges Engendered a Hostility Greater Than That Excited by a Charge of Burglary.

Petitioner's counsel, anxious to omit no point that might avail the man whom this Court has appointed him to represent, erects a very skillful argument upon the suggestion that petitioner might have been guilty of some lesser offense, such as that of the statutory crime of "contributing to the delinquency of a minor."

He may well have been guilty of that offense, in addition to the offense to which he pleaded guilty, just as Foster and Payne were guilty of larceny as well as burglary and of conspiracy to commit the crimes of burglary and lar-

[2] Illinois' brief in the *Foster* case, page 17.

ceny. But if he did the acts charged in the indictments, and his plea of guilty admitted that he did commit them, then he was certainly guilty of the crime which the Illinois statute denounces and punishes. The facts were simple facts and were plainly described in the indictments. If committed at all, they afford *not the slightest possibility* that the accused was not guilty of the statutory crime. The suggestion of petitioner's counsel that the nature of the charge must necessarily have been one to engender such hostility as to deprive petitioner of actual volition in the matter of his arraignment is a surmise.

The Suggestion that Petitioner Was Denied the Opportunity Intelligently to Consider the Possibility of Pleading Guilty to a Lesser Offense.

Petitioner's counsel repeats the identical argument that was very ably presented to but rejected by this Court in the *Foster* case, that is, the argument that the accused, with the assistance of counsel, might have obtained the privilege of pleading guilty to a lesser offense.

In the first place, this argument was rejected by the Court in the *Foster* case.

In the second place, if this argument were to be recognized in the instant case, it would result in the virtual overruling of this Court's considered declaration that there is no categorical right to counsel in non-capital state cases; for *any* accused, including Foster and his co-defendant, could make the same argument.

Finally, there is no right, constitutional or otherwise, to indulgence on the part of one guilty of a greater offense in the form of leave to plead guilty to a lesser offense.

The Simplicity of the Charge to Which Petitioner Pleaded Guilty.

The acts charged in the indictment and admitted by the petitioner, namely, the partial removal of the undergarments of two little girls and the playing with their *genitalia*, and the alleged libidinous intention, namely, the intention to gratify the passion of the petitioner, were simple acts. Indeed, they were primitive.

The indictments uttered the charge in language understandable to any ordinary layman. The consensus of juridical thought, legislative and judicial, regards such acts as *prima facie* crimes and not as acts done under such derangement as to deprive the accused of knowledge of the difference between right and wrong and the ability to choose between right and wrong.

The crimes were, therefore, *prima facie*, at least, as simple as the burglary to which Foster and Payne pleaded guilty in the *Foster* case.[3]

It is therefore submitted that this case cannot be distinguished from the *Foster* case upon any principle which would take cognizance of and contrast the specific facts of the two cases; for in each case there was an indictment charging a crime simple in character, a plea of guilty, and an indeterminate sentence. Unless, therefore, this Court is either to overrule its decision in the *Foster* case or virtually to annul its opinion in that case, the judgment in the present case must be affirmed.

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[3] Modern psychiatric criminology is in the throes of a profound debate, really philosophical rather than clinical in its presuppositions and as old as reasoned metaphysics, as to how far the perpetrator of admittedly

III.

If particular circumstances, such as petitioner's mental instability, required the appointment of counsel, other remedies, original and not appellate in nature of office, are available and appropriate.

This court has recognized that neither the Illinois Supreme Court need not (*Carter* v. *Illinois*, 329 U. S. 173) and that this Court will not (*Claassen* v. *United States*, 142 U. S. 140; *Mathews* v. *United States*, 123 U. S. 182) take cognizance of matters *dehors* the record upon a writ of error on appeal. This Court said in the *Carter* case (page 179):

> "Whether the defendant is entitled to press such claims to show a denial by the State of Illinois of a constitutional right, it will be time enough to consider when that issue is properly before us after being presented in a proceeding in the State courts appropriate to that purpose, or, if none is available, in a federal court. *Woods* v. *Nierstheimer*, *supra*"; [328 U. S. 211] "*Ex parte Hawk*, *supra*." [321 U. S. 114.]

Therefore, even if this Court should accede to the views expressed by Justices Rutledge, Douglas and Murphy in their specially concurring opinion in the *Marino* case that Illinois' procedural techniques are inadequate for investiga-

anti-social acts, erotic or otherwise, is "responsible" for his conduct. Absolute materialism, of course, indicates that free will or "volition" is a pure illusion, not only with respect to the "degenerate" but with respect to all of us. Other metaphysical premises lead to the extremely opposite view, namely, that everyone is responsible for his own act. Between these two extremes is the pragmatic attitude upon the part of many psychiatrists, approximating but not identical with that of contemporary juridical thought and public *mores*, that there is such a thing as free will but that it can be overborne by "pathology," organic and objectively demonstrable or functional and to be inferred only from "irrational" conduct.

But presumption of mental instability is no more a part of the common law, nor, we submit, of constitutional law, in cases involving sexual crimes than it is in other offenses.

tion of matters ulterior to the record in prisoners' cases, this Court need not for that reason void or reverse this or any other *appellate* judgment of the Supreme Court of Illinois that affirms a conviction fair upon its face. It is sufficient that, in this Court's language in the *Carter* case above quoted, "it will be time enough to consider * * * that issue", viz., the issue as to due process upon a consideration of matters *dehors* the record where counsel was not provided, "when that issue is properly before us after being presented in a proceeding in the State courts appropriate to that purpose, *or, if none is available, in a federal court.*"

Nevertheless, we earnestly assure this Court that, whatever doubt it may entertain as to the availability of Illinois' *coram nobis* proceeding as a means for testing any charge of denial of due process except one involving mental instability or the nonage of the accused, *coram nobis* is classically appropriate where the charge is that the accused was mentally incompetent at the time of his arraignment intelligently to plead thereto. (*Hawks* v. *People*, 398 Ill. 281. See also *Jablonski* v. *People*, 330 Ill. App. 422, where the court held that *coram nobis* was available to a petitioner sixteen years after conviction where the petitioner alleged that at the time of his conviction he was feebleminded, and therefore unable to plead to an indictment.)

Conclusion.

Unless this Court is to declare that a plea of guilty to a sexual offense without the assistance of counsel raises a presumption different from that raised in other types of cases or unless it is to overrule *Foster* v. *Illinois*, 332 U. S. 134, *Betts* v. *Brady*, 316 U. S. 455, and its own pronouncement under the Sixth as well as under the Fifth Amendments, *Adams* v. *United States*, 317 U. S. 269, 277, that

> "not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt,"

the judgment of the Supreme Court of Illinois should be affirmed or this Court's writ of *certiorari* should be dismissed on the ground that no substantial federal question is presented.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 398.—October Term, 1947.

Roy Bute, Petitioner, v. People of the State of Illinois.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[April 19, 1948.]

Mr. Justice Burton delivered the opinion of the Court.

In the Circuit Court of La Salle County, Illinois, the petitioner, Roy Bute, pleaded guilty to the crime of "taking indecent liberties with children" as charged in each of two indictments and, on each plea, was sentenced to confinement in the Illinois State Penitentiary for not less than one nor more than 20 years, the sentences to run consecutively. Each common law record is silent on the subject of counsel for the petitioner's defense. The issue here is whether or not each state sentence shall be held to have been imposed in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States[1] because each common law record shows that the petitioner appeared "in his own proper person" and does not show that the court inquired as to the petitioner's desire to be represented by counsel, or his ability to procure counsel, or his desire to have counsel assigned to him to assist him in his defense, or that such counsel was offered or assigned to him. We hold that such a silence in the respective records does not suffice to invalidate the sentences. We

[1] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amend. XIV, § 1.

hold further that, in the absence of any showing beyond that in these records, the due process clause of the Fourteenth Amendment did not require the Illinois court to make the inquiries or the offer or assignment of counsel now claimed to have been the right of the petitioner.

At the time of these indictments, June 17, 1938, the petitioner was 57 years old. Each indictment, in its first count, charged him with taking indecent liberties on May 19, 1938, with a girl under the age of 15, and, in its second count, with attempting to do so. The first indictment related to a girl of eight and the second to a girl of 11. The offenses charged were violations of Ill. Rev. Stat. c. 38, § 109 (1937).[2]

The intelligibility of the indictments is evident from the following language quoted from the first:

> "That Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards, did then and there unlawfully and feloniously take certain immoral, improper and indecent liberties with a certain female child, under the age of fifteen (15) years, and of the age of eight (8) years, to-wit, . . . with intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute contrary to the form

[2] ". . . any person of the age of seventeen years and upwards who shall take, or attempt to take, any immoral, improper or indecent liberties with any child of either sex, under the age of fifteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, . . . shall be imprisoned in the penitentiary not less than one year nor more than twenty years: . . ."

of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois." [3]

The material portions of the records in these cases are identical, except for the names and ages of the children. They contain all that was before the Supreme Court of Illinois or that is before this Court. The following appears in each:

"ARRAIGNMENT AND PLEA OF GUILTY—June 20, 1938

"Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.

"And the said defendant being now arraigned before the bar of this Court moves the Court for leave to enter his plea of Guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein; and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea

[3] An indictment stating this offense substantially in the language of the statute, though not setting out facts constituting the elements of the crime, was sufficient. *People* v. *Rogers*, 324 Ill. 224, 229, 154 N. E. 909, 911; *People* v. *Butler*, 268 Ill. 635, 641, 109 N. E. 677, 679; *People* v. *Scattura*, 238 Ill. 313, 314–315, 87 N. E. 332, 333.

A copy of each indictment, with both counts on the same sheet, was furnished to the petitioner and the devastating frankness of the second count in describing the acts complained of rendered impossible any misunderstanding of the charge. The petitioner does not contend that he failed to understand it. By leave of court, the State entered "Nolle Prosequi" as to each second count.

of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.

"Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.

"Thereupon the Court finds the age of the said defendant to be fifty-seven (57) years.

"JUDGMENT

"Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the judgment of the Court should not now be pronounced against him on his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

"Whereupon it is Ordered by the Court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years."

In October, 1946, the petitioner, while serving his sentence in the Illinois State Penitentiary, and appearing *pro se*, filed in the Supreme Court of Illinois motions asking leave "to Sue as a Poor Person for Writ of Error . . ." to review each of the original proceedings. These were granted and he filed his petitions, *pro se*, based upon the common law records in the respective cases. He relied particularly upon the claim that he had been denied representation by counsel, that the trial court had not advised

him of his rights or of his right to the assistance of counsel and that he had been rushed to trial with such expedition as to deprive him of a fair and impartial trial, all of which rights he claimed were guaranteed to him by the State and Federal Constitutions.

The Supreme Court of Illinois affirmed both judgments. 396 Ill. 588, 72 N. E. 2d 813. It denied expressly each of the above-mentioned claims and denied a rehearing. We granted certiorari in recognition of the frequently arising constitutional principle involved. 332 U. S. 756. The petitioner's presentations, *pro se*, were marked with professional accuracy and clarity but the petition for certiorari states that the petitioner is ignorant of the law as he was at the time of his trial, and that the documents filed by him *pro se* had been prepared for him. We appointed a member of the Bar of this Court to act as counsel for the petitioner here and the petitioner's claims have been fully and competently presented to this Court.

EFFECT OF FOURTEENTH AMENDMENT.

The cases turn upon the meaning of "due process of law" under the Fourteenth Amendment in relation to the assistance of counsel for the defense of the accused in state criminal trials such as these. In *Powell* v. *Alabama*, 287 U. S. 45, this Court granted relief in a group of capital cases which demonstrated the essential need for applying the full force of the Fourteenth Amendment to the invalidation of purportedly valid judgments rendered in a state court under the circumstances there shown. Those and other less extreme cases have well illustrated the kind of service to the cause of justice which can be rendered by this Court in thus giving effect to the Fourteenth Amendment.

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it re-

quires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the States and do not depend upon or vary with local legislation." *Hebert* v. *Louisiana*, 272 U. S. 312, 316–317.

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence." *Holden* v. *Hardy*, 169 U. S. 366, 389–390.

The foregoing statements were referred to with approval in *Powell* v. *Alabama*, *supra*, at pp. 67, 71–72.

The present case, on the other hand, illustrates equally well the kind of judgments by a state court that should not be invalidated as lacking in the due process of law required by the Fourteenth Amendment. This is so, although the procedure followed, in 1938, by the state court in the instant cases, as to counsel for the accused might not have satisfied the practice then required of a federal court in the case of comparable federal crimes. The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases. It says merely

"nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ." *Hebert* v. *Louisiana, supra,* at p. 316. This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts. It recognizes that differences arise naturally between the procedures in the state courts and those in the federal courts.[4]

One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the Federal Government. The compromise between state rights and those of a central government was fully considered in securing the ratification of the Constitution

[4] One long recognized difference between the trial procedure in the federal courts and that in many state courts is the greater freedom that is allowed to a federal court, as compared with that allowed to a state court, to comment upon the evidence when submitting a case to a jury. See *Quercia* v. *United States,* 289 U. S. 466, 469; *Patton* v. *United States,* 281 U. S. 276, 288; *Simmons* v. *United States,* 142 U. S. 148, 155. The federal practice is based upon the rules of common law comparable to those mentioned in the Seventh Amendment. The federal and state practices have their respective proponents and opponents, but both practices unquestionably represent "due process of law."

in 1787 and 1788.[5] It was emphasized in the "Bill of Rights," ratified in 1791. In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and particularly upon procedure in the federal courts.[6] None were placed upon

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[5] See Federalist Papers, Number XLIV, Restrictions on the Authority of the Several States; Number XLV, The Alleged Danger from the Powers of the Union to the State Governments Considered; Number XLVI, The Influence of the State and Federal Governments Compared.

[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const. Amend. IV, V, VI, VII and VIII.

the states. On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments.[7] The Constitution was conceived in large part in the spirit of the Declaration of Independence which declared that to secure such "unalienable Rights" as those of "Life, Liberty and the pursuit of Happiness . . . . Governments are instituted among Men, deriving their just powers from the consent of the governed, ..." It sought to keep the control over individual rights close to the people through their states.[7] While there have been modifications made by the states, the Congress and the courts in some of the relations between the Federal Government and the people, there has been no change that has taken from the states their underlying control over their local police powers and state court procedures. They retained this control from the beginning and, in some states, local control of these matters long antedated the Constitution. The states and the people still are the repositories of the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, ..."[8] The underlying control over the procedure in any state court, dealing with distinctly local offenses such as those here involved, consequently remains in the state. The differing needs and customs of the respective states and even of the respective communities within each state emphasize the principle that familiarity with, and complete understanding of, local characteristics, customs and standards are foundation stones of successful self-government. Local processes of law are an essential part of any gov-

[7] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. Amend. IX and X.

[8] U. S. Const. Amend. X, note 7, *supra*.

ernment conducted by the people. No national authority, however benevolent, that governs over 130,000,000 people in 48 states, can be as closely in touch with those who are governed as can the local authorities in the several states and their subdivisions. The principle of "Home Rule" was an axiom among the authors of the Constitution. After all, the vital test of self-government is not so much its satisfactoriness weighed in the scales of outsiders as it is its satisfactoriness weighed in the scales of "the governed." While, under the Constitution of the United States, the Federal Government, as well as each state government, is at bottom a government by the people, nevertheless, the federal sphere of government has been largely limited to certain delegated powers. The burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim. This point of view is material in the instant cases in interpreting the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states, including Illinois. In our opinion this limitation is descriptive of a broad regulatory power over each state and not of a major transfer by the states to the United States of

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"Due process of law in the latter [*i. e.*, the Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." *Hurtado* v. *California*, 110 U. S. 516, 535.

the primary and pre-existing power of the states over court procedures in state criminal cases.

Until the taking effect of the Fourteenth Amendment in 1868, there was no question but that the states were free to establish their own court procedures. This freedom included state practice as to the assistance of counsel to be permitted or assigned to the accused for his defense in state criminal cases. Because the Constitution of the United States, during nearly 80 formative years, thus permitted each state to establish, maintain and accustom its people to that state's own forms of "due process of law," a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right to continued recognition by the Federal Government as "due process of law." While such a presumption does not arise in favor of any practice against which the Fourteenth Amendment was particularly directed, there is no reason to feel that, in 1868, such Amendment was particularly directed against the practice now before us.

ILLINOIS CONSTITUTIONAL PROVISIONS.

From the inception of their statehood the people of Illinois have recognized their own responsibility for the preservation of local due process of law and of the civil rights of individuals within the jurisdiction of that State. They dealt at length with such matters in their original constitution of 1818. In Article VIII they provided—

> "That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare:
>
> "§ 9. That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to

have compulsory process to compel the attendance of witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage, and that he shall not be compelled to give evidence against himself." [10] Reprinted in Ill. Rev. Stat. (1937).

The Illinois Constitution of 1848 contained a comparable "Declaration of Rights" in Article XIII. Among that Article's 26 sections were §§ 8 and 9, substantially readopting language used in §§ 8 and 9 of Article VIII of the original constitution.[11]

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[10] Article VIII of the Illinois Constitution of 1818 contained 23 sections dealing with the types of matters that are found in the Federal Bill of Rights. On the subject of "due process" it included the following:

"§ 8. That no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the law of the land. . . ."

[11] Article XIII of the Illinois Constitution of 1848 contained the following:

"That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare:

. . . . . .

"§ 8. That no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.

"§ 9. That in all criminal prosecutions the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his favor; and in prosecutions by indictment or information, to speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed, which county or district shall have been previously ascertained by law, and that he shall not be compelled to give evidence against himself." Reprinted in Ill. Rev. Stat. (1937).

In the Illinois Constitution of 1870, a "Bill of Rights" was set forth in Article II dealing with these subjects and including §§ 2 and 9 in the following form:

> "§ 2. No person shall be deprived of life, liberty or property, without due process of law.
>
> "§ 9. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Reprinted in Ill. Rev. Stat. (1937).

These latter provisions were in effect in Illinois at the time of the trial of the instant cases. There is and can be no question raised here but that the procedure in the instant cases conformed to the Illinois Constitution as interpreted by the Supreme Court of that State.

The Constitution of the United States thus left the power to regulate the procedure as to the assistance of counsel for the defense of the accused in state criminal cases to the discretion of the respective states, at least until 1868. The Fourteenth Amendment then was adopted to meet the crying needs of that time.[12]

[12] For historical treatments of the Sixth and Fourteenth Amendments in decisions of this Court in relation to the general subject matter of the instant cases see especially, *Adamson* v. *California*, 332 U. S. 46, concurring opinion pp. 61–68, dissenting opinion pp. 68–123; *Betts* v. *Brady*, 316 U. S. 455, 464–472, dissenting opinion pp. 477–480; *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463; *Palko* v. *Connecticut*, 302 U. S. 319, 322–328; *Powell* v. *Alabama*, 287 U. S. 45, 59–69; *Hurtado* v. *California*, 110 U. S. 516, 520–538, dissenting opinion pp. 538–558; *Davidson* v. *New Orleans*, 96 U. S. 97, 100–104.

JUDICIAL INTERPRETATION OF FOURTEENTH AMENDMENT.

After exhaustive consideration of the subject, this Court has decided that the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights. There is nothing in the Fourteenth Amendment specifically stating that the long recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited. Unlike the Bill of Rights, the Fourteenth Amendment made no mention of any requirement of grand jury presentments or indictments as a preliminary step in certain criminal prosecutions; any universal prohibition against the accused being compelled, in a criminal case, to be a witness against himself; any jurisdictional requirement of juries in all criminal trials; any guaranty to the accused that he have a right to the assistance of counsel for his defense in all criminal prosecutions; or any need to observe the rules of the common law in the re-examination of all facts tried by a jury.[13] In spite of such omissions, it is claimed here, on behalf of the petitioner, that even though the failure

[13] A classic statement of why it is due process to do many things in the state courts, particularly of a procedural nature, that may not be done in federal courts because of the specific procedural requirements of the Federal Bill of Rights was made by Mr. Justice Cardozo in the light of his long experience in state courts.

"We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government

of the state court in these cases to inquire of the accused as to his desire to be represented by counsel, or his ability to procure counsel, or his desire to have counsel assigned to him to assist him in his defense, and even though the failure of the state court in these cases to offer or assign counsel to the accused for his defense may have satisfied the Illinois law and have amounted to "due process of law" under the Illinois Constitution,[14] yet such practices did not satisfy the "due process of law" required of the states by the Fourteenth Amendment to the Constitution of the United States.

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is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

"The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado* v. *California*, 110 U. S. 516; *Gaines* v. *Washington*, 277 U. S. 81, 86. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining* v. *New Jersey*, 211 U. S. 78, 106, 111, 112. Cf. *Snyder* v. *Massachusetts*, *supra*, p. 105; *Brown* v. *Mississippi*, 297 U. S. 278, 285. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker* v. *Sauvinet*, 92 U. S. 90; *Maxwell* v. *Dow*, 176 U. S. 581; *New York Central R. Co.* v. *White*, 243 U. S. 188, 208; *Wagner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 232. As to the Fourth Amendment, one should refer to *Weeks* v. *United States*, 232 U. S. 383, 398, and as to other provisions of the Sixth, to *West* v. *Louisiana*, 194 U. S. 258." *Palko* v. *Connecticut*, 302 U. S. 319, 323–324.

[14] Art. II, § 2, of the Illinois Constitution of 1870, *supra*.

To sustain this claim, it is necessary for the petitioner to establish that, in spite of the constitutionality of the process of law developed by Illinois in its own criminal cases, prior to 1868, yet that same Illinois process of law, after 1868, no longer is constitutionally valid as "due process of law" under the Fourteenth Amendment. We recognize that the Fourteenth Amendment, as part of the supreme law of the land under Article VI of the original Constitution, supersedes "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The important question remains, however: what shall be considered to be to the contrary? It is the established policy of both the State and Federal Governments to treat possible conflicts between their powers in such a manner as to produce as little conflict and friction as possible. So here the procedure followed by Illinois should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless the Illinois procedure violates "the very essence of a scheme of ordered liberty" and that to continue it would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Cardozo, J., in *Palko* v. *Connecticut*, 302 U. S. 319, 325, with quotation from his opinion in *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. See *Foster* v. *Illinois*, 332 U. S. 134, 137; *Adamson* v. *California*, 332 U. S. 46, concurring opinion at pp. 61–67; *Betts* v. *Brady*, 316 U. S. 455, 465; *Brown* v. *Mississippi*, 297 U. S. 278, 285–286; *Powell* v. *Alabama*, 287 U. S. 45, 61–62, 67, 71–72; *Hebert* v. *Louisiana*, 272 U. S. 312, 316; *Twining* v. *New Jersey*, 211 U. S. 78; *Holden* v. *Hardy*, 169 U. S. 366, 389–390; *Hurtado* v. *California*, 110 U. S. 516, 532, 535, 537.

It is natural for state procedures to differ from each other in many ways. It is permissible for the states to establish ways of safeguarding the respective interests of the prosecution and of the accused in their courts. These

may differ from comparable practices developed in the courts of other states or of the United States. Before examining the Illinois practice and the precise facts of the cases before us, it is helpful to see what has been the practice in the courts of the United States and especially to see what such practice was in 1938, at the time of the trial of the instant cases. While such federal court practice does not establish a constitutional minimum standard of due process which must be observed in each state under the Fourteenth Amendment, yet such practice does afford an example approved by the courts of the United States. It thus contributes something toward establishing a general standard of due process currently and properly applicable to the states under the Fourteenth Amendment.

PRACTICE IN FEDERAL COURTS.

The practice in the federal courts as to the right of the accused to have the assistance of counsel is derived from the Sixth Amendment which expressly requires that, in all criminal prosecutions in the courts of the United States, the accused shall have the assistance of counsel for his defense.[15] There is no proof possible that the same practice would have developed under the due process clause of the Fifth Amendment had there been no specific provision on the subject in the Sixth Amendment. It is obvious also that there is no specific provision in the Fourteenth Amendment comparable to that in the Sixth Amendment. Furthermore, at the time of the trial of this case in 1938, the rule of practice even in the federal courts was not as clear as it is today. The federal statutes

[15] See note 6, *supra*. "By virtue of that provision [in the Sixth Amendment], counsel must be furnished to an indigent defendant prosecuted in a federal court in every case, whatever the circumstances." *Foster* v. *Illinois*, 332 U. S. 134, 136–137. See also, *Betts* v. *Brady*, 316 U. S. 455, 461, 464–465; *Glasser* v. *United States*, 315 U. S. 60, 70; *Johnson* v. *Zerbst*, 304 U. S. 458; *Palko* v. *Connecticut*, 302 U. S. 319, 327.

were then, and they are now, in practically the same form as when they were enacted in 1789 and 1790. They provided merely for a right of representation in the federal courts by the accused's own counsel and required assignment of counsel by the court only on accusations for treason or other capital crimes.[16] In fact, until the decision of this Court in May, 1938 (one month before the trial of the instant cases in the Illinois state court), in *Johnson* v. *Zerbst*, 304 U. S. 458, there was little in the decisions of any courts to indicate that the practice in the federal courts, except in capital cases, required the appointment of counsel to assist the accused in his defense, as contrasted with the recognized right of the accused to be represented by counsel of his own if he so desired. That pre-1938 practice, however, was in the face of the language of the Sixth Amendment which was held in *Johnson* v. *Zerbst*, *supra*, to require the appointment of counsel in any federal criminal case where the accused had no counsel and did not waive the assistance of counsel.[17]

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[16] "In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein." Jud. Code, § 272, 36 Stat. 1164, 28 U. S. C. § 394.

This is almost verbatim as it was enacted as § 35 in the First Judiciary Act, September 24, 1789, 1 Stat. 92.

"Every person who is indicted of treason, or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. . . ." R. S. § 1034, 18 U. S. C. § 563.

This conforms closely to § 29 in the first Federal Crimes Act, approved April 30, 1790, 1 Stat. 118.

[17] "It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment 'to have the assistance of counsel for his defense' was generally understood as meaning that in the Federal courts the defendant in a crim-

"The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at p. 463. See *Powell* v. *Alabama*, 287 U. S. 45, 68, 69 and *Patton* v. *United States*, 281 U. S. 276, 308, as quoted in the *Zerbst* case. See also, *Walker* v. *Johnston*, 312 U. S. 275.

The view of this Court as to the practice best adapted to the needs of the federal courts and most responsive to the requirements of the Federal Constitution and statutes as well as to the decisions of this Court is now stated in Rule 44 of the Federal Rules of Criminal Procedure which became effective March 21, 1946.[18] In view, however,

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inal case was entitled to be represented by counsel retained by him. It was not assumed that this constitutional privilege comprised the right of a prisoner to have counsel assigned to him by the court if, for financial or other reasons, he was unable to retain counsel. The Sixth Amendment was not regarded as imposing on the trial judge in a Federal court the duty to appoint counsel for an indigent defendant.

"The marked departure effected by the decision in *Johnson* v. *Zerbst* created a practical difficulty in respect to cases previously tried. No obstacle existed in connection with the application of this ruling to subsequent proceedings." Holtzoff, The Right of Counsel Under the Sixth Amendment, 20 N. Y. U. L. Q. Rev. 1, 7–8, 10 (1944).

At the time of making the above statement, Judge Holtzoff was the Secretary for the Advisory Committee on Federal Rules of Criminal Procedure.

[18] "RULE 44. ASSIGNMENT OF COUNSEL. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Fed. R. Crim. P., effective March 21, 1946, 327 U. S. 866–867, 18 U. S. C. 1946 ed., following § 687.

"This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial deci-

of the applicability to the state courts of the Fourteenth rather than the Sixth Amendment, this new rule cannot be regarded as defining, even by analogy, the minimum requirement of due process for the states under the Fourteenth Amendment. The new rule is evidence only of what this Court considers suitable in the federal courts and the states, in their discretion, may or may not follow it. The states are free to determine their own practice as to the assistance of counsel, subject to the general limitation that such practice shall not deprive the accused of life, liberty or property without due process of law. Accordingly, the lack of conformity of Illinois practice in 1938 to the standards illustrated by the present Federal Rules of Criminal Procedure is by no means determinative of the issue before us.

PRACTICE IN STATE COURTS.

As throwing light on the general practice in the several states, the National Commission on Law Observance and Enforcement, under the chairmanship of George W. Wickersham, in its Report on Prosecution in 1931, said:

> "In America counsel was allowed from an early date and State and Federal Constitutions guarantee to accused in all prosecutions 'the assistance of counsel for his defense,' in this or some equivalent language. It will be seen from this bit of history that, as indeed the courts have held, the right guaranteed is one of employing counsel, not one of having counsel provided by the Government. But in the spirit of the guaranty most of the States have by legislation au-

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sions. . . . The present extent of the right of counsel has been defined recently in *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; and *Glasser* v. *United States*, 315 U. S. 60. The rule is a restatement of the principles enunciated in these decisions." Notes to the Rules of Criminal Procedure for the District Courts of the United States, as prepared under the direction of the Advisory Committee on Rules of Criminal Procedure, March, 1945, p. 38.

thorized or even required the courts to assign counsel for the defense of indigent and unrepresented prisoners. As to capital cases, all the States so provide. Thirty-four States so provide for felonies and 28 for misdemeanors." Vol. I, p. 30.

The foregoing suggests the existence of a gradual voluntary trend among the states toward the authorization by them of the appointment of counsel to assist the accused in his defense in all criminal prosecutions, with special consideration to the seriousness of the charge faced and to the actual needs of the accused under the circumstances of each case. Much of this trend has taken place since 1868. It is neither universal nor uniform. The above summary shows that 20 states, in 1931, had no statute authorizing such appointments of counsel in misdemeanor cases and 14 had none, even in felony cases, unless the charges were for capital offenses. Furthermore, some of these authorizations, as in Illinois, were subject to special limitations requiring an affirmative showing to be made by the accused of his inability to procure counsel for himself.

Another indication of the opinion of representative members of the Bench, Bar and law school faculties appears in the following quotation from § 203 of the Code of Criminal Procedure, approved by the American Law Institute in 1930:

"Before the defendant is arraigned on a charge of felony if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned him by the court." At p. 88.

The Commentary of the Institute accompanying this Section shows that the assistance recommended for the accused in § 203 of the proposed Code was then far in advance of the statutes in most of the states. The Commentary also illustrates the variations existing among the processes adopted by the states in their search for a satisfactory process of law in this regard. It demonstrates that, up to 1930, but limited progress had been made by statute toward the standard now claimed by the petitioner to have become constitutionally essential to a valid judgment in the instant cases in 1938.[19] It illustrates the wide difference naturally and constitutionally existing between what has been prescribed by the several states and what has been recommended to them by the Institute. We do not find in the Fourteenth Amendment authority for this Court to do what is asked of us here, namely, to require all the states to enforce in substance either Rule 44 of the new Federal Rules of Criminal Procedure or the proposed § 203 of the Code of Criminal Procedure recom-

[19] The tabulations show that, as of 1930, 13 states "provide that if the defendant appear for arraignment without counsel he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel." Six states "provide that the accused has a right to counsel: . . . ." Eighteen states, including Illinois, provide under varying conditions "that the court shall assign counsel if the accused desire it, and be unable to employ counsel: . . . ." Fifteen states, including Illinois, provide under varying conditions "that the court shall assign counsel if the accused be unable to employ counsel: . . . ." Both Illinois and Louisiana required a showing of inability to be made by the accused under oath. Five states "provide that the court shall assign counsel if accused desire it: . . . ." Three states provide that the court may appoint one or more attorneys to represent the accused and 14 "provide that the appointment of counsel by the court for the defense of the accused shall not exceed two: . . . ." Thirteen states "provide that counsel for the defense shall have free access to the prisoner at all reasonable hours: . . . ." Code of Criminal Procedure, Commentary to § 203 (1930) 630–634.

mended by the American Law Institute, all under penalty of the invalidation of every past and future nonconforming state judgment.

In reviewing the situation further, in 1942, this Court, in *Betts* v. *Brady*, 316 U. S. 455, indicated that it did not regard it to be a violation of the Fourteenth Amendment for a Maryland trial court to refuse to appoint counsel to represent an indigent defendant charged with robbery under the circumstances of that case.[20] We there stated the general principle as follows:

> "The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. . . . Asserted denial [of counsel] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application

[20] This Court summarized those circumstances as follows:

"In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure." *Id.* at p. 472.

of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed." *Id.* at pp. 461–462.[n]

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[n] The Court also reviewed the material constitutional and statutory provisions of the thirteen original states. *Id.* at p. 467. It then summarized as follows other constitutional and statutory provisions currently in force:

"The constitutions of all the States, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. Those of nine States may be said to embody a guarantee textually the same as that of the Sixth Amendment, or of like import. In the fundamental law of most States, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice.

. . . . . .

"In eighteen States the statutes now require the court to appoint in all cases where defendants are unable to procure counsel. . . . And it seems to have been assumed by many legislatures that the matter was one for regulation from time to time as deemed necessary, since laws requiring appointment in all cases have been modified to require it only in the case of certain offenses." *Id.* at pp. 467–468, 470–471.

Particularly from the failure of the states to treat the requirement of inquiry by the court as to counsel or the requirement of appointment of counsel, either uniformly or as a matter for incorporation in the state constitutions, the Court concluded—

"we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness." *Id.* at pp. 471–472.

The dissenting opinion also marshals the states and collects them under the following headings: 35 states, including Illinois, by constitutional or statutory provision or by judicial decision or established practice judicially approved, require "that indigent defendants in non-capital as well as capital criminal cases be provided with counsel *on request*: . . ." (Italics supplied); of the remaining 13, nine "are without constitutional provision, statutes, or judicial decisions clearly

If, in the face of these widely varying state procedures, this Court were to select the rule contended for by the petitioner and hold invalid all procedure not reaching that standard, it not only would disregard the basic and historic power of the states to prescribe their own local court procedures (subject only to a broad constitutional prohibition in the Fourteenth Amendment against the abuse of that power) but it would introduce extraordinary confusion and uncertainty into local criminal procedure where clarity and certainty are the primary essentials of law and order.

PRACTICE IN ILLINOIS COURTS.

The precise question here is whether the sentences in the two Illinois cases before us violated the Fourteenth Amendment. The Supreme Court of Illinois has affirmed both sentences, *supra*, 396 Ill. 588, 72 N. E. 2d 813. It has thus conclusively established their compliance with Illinois law. While such a finding of compliance with local law is not necessarily sufficient to satisfy the requirements of due process under the Fourteenth Amendment, we shall be helped, in measuring the compliance of these judgments with such due process, if we note exactly the requirements of Illinois law with which the Supreme Court of that State has found compliance.

The material Sections of the Illinois Constitution have been quoted. Illinois Constitution of 1870, Art. II, §§ 2 and 9, *supra*. They provided that no person should be

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establishing this requirement: . . ."; there are two states "in which dicta of judicial opinions are in harmony with the decision by the court below in this case: . . ." (here affirmed); and there are two states "in which the requirement of counsel for indigent defendants in non-capital cases has been affirmatively rejected: . . . ." *Id.* at pp. 477–480. For the instant cases, the important point is that this tabulation shows that only 35 states required the appointment of counsel for indigent defendants in noncapital cases, *even upon the accused's request for such appointment*. No such request was present here.

deprived of life, liberty or property, without due process of law and that, in all criminal prosecutions, the accused had the right to appear and defend in person and by counsel. The statutes of Illinois in effect in 1938 contained the following requirements as to the allowance and assignment of counsel to a person charged with crime and differentiated between the procedure required in a capital case and that required in other cases:

> "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private. . . .
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> "Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, ..." Ill. Rev. Stat. c. 38, § 730 (1937).

An Illinois statute also provided expressly for cases in which the party accused had pleaded "guilty." The record in the instant cases shows complete compliance with this provision which, in effect, placed upon the trial court primary responsibility for seeing to it that the procedure met all legal requirements, whether of state or federal origin.

> "In cases where the party pleads 'guilty,' such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea; after which, if the party persist in pleading 'guilty,' such plea shall be received and recorded, and the court shall proceed to render judgment and execution thereon, as if he had been found

guilty by a jury. In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense." Ill. Rev. Stat. c. 38, § 732 (1937).

PRACTICE IN THE INSTANT CASES.

It is not our province to prescribe which procedure we consider preferable among many permissible procedures which lawfully could be followed by an Illinois or any other state court in connection with counsel for the defense of a party accused of a state crime. It is our province to decide whether the practice of the Illinois court in these cases, although admittedly in conformity with the law of Illinois, was so clearly at variance with procedure constituting "due process of law" under the Fourteenth Amendment that these sentences must be completely invalidated. This brings us to an analysis of the precise facts presented by the records. Each crime was punishable by a mandatory sentence of from one to 20 years in the penitentiary. The charges were stated in simple terms, not ordinarily capable of being misunderstood by a 57-year old man, however elementary or primitive his understanding. There is no claim that this petitioner failed to understand the charges. Before he pleaded guilty, the court "admonished and explained to the said defendant the consequences and penalties, . . ." which would result from his plea of guilty if made. The records then recite, largely in the language of the statute, that "the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave." We do not accept the argument that these records are to be considered unreliable because they are almost exactly in the language of the statute. The im-

portant point is not so much that a certain phraseology is used, as it is that the court actually represented the State at the trial and that the court did what the statute required of it. It cannot be argued, without factual support, that the court failed to do its full duty with an intelligent, competent and understanding appreciation of all of its state and federal obligations. In the light of all the circumstances which must have been obvious to the judge presiding in the courtroom, but are incapable of reproduction here, the court granted leave to the petitioner to enter his plea of guilty in each case. Before sentence was passed, the record shows that the State's attorney and the petitioner, in his own proper person, came before the court and the petitioner "not saying anything further why the judgment of the Court should not now be pronounced . . ." the court pronounced, in each case, the mandatory sentence for the crime to which the petitioner had pleaded guilty. On the facts thus before us in these records, which must be our sole guides in these cases, there is no good reason to doubt either the due process or the propriety of the procedure followed by the trial court. There is nothing in the records on which to base a claim that the petitioner's conduct did not fit the charges made against him. There is nothing in them on which to base a claim of abnormality, intoxication, or insanity on the part of the petitioner or on which to base a claim that there was any indignation, prejudice or emotional influence affecting the conduct or thought of anyone connected with these trials. The presence of the judge, the State's attorney, and the petitioner, together with a natural wish on the part of the petitioner not to expand upon the shame of these crimes, provide no ground for a conclusion that there has been any failure, much less any constitutional failure, of fair judicial process. Doubts should be resolved in favor of the integrity, competence and proper performance of their

official duties by the judge and the State's attorney. They were state officials lawfully chosen to discharge serious public responsibilities under their oaths of office. Especially in a self-governing state and nation, governmental stability depends upon the giving of full faith and credit in form, substance and spirit to public acts, records and judicial proceedings not only among the states but among individuals and between their State and Federal Governments.

Although the records disclose no affirmative basis for invalidating the sentences, it is suggested that an error of omission appears in the failure of the records to show either the presence of counsel for the accused, or an inquiry by the court as to counsel for the accused, or the appointment of counsel by the court to assist the accused. Here also if any presumption is to be indulged it should be one of regularity rather than that of irregularity. Eight years after the trial, in the complete absence of any showing to the contrary, such a presumption of regularity indicates that the court constitutionally discharged, rather than unconstitutionally disregarded, its state and federal duties to the petitioner, including those relating to his right, if any, to the assistance of counsel. *People* v. *Fuhs*, 390 Ill. 67, 60 N. E. 2d 205. It is not necessary, however, for us to depend upon such a presumption.

In the light of the affirmance of the instant judgments by the Supreme Court of Illinois and in the absence of evidence to the contrary, it is clear that the trial court at least did not violate any express requirements of any state statutes calling for affirmative action by the court. *People* v. *Russell*, 394 Ill. 192, 67 N. E. 2d 895; *People* v. *Stack*, 391 Ill. 15, 62 N. E. 2d 807; *People* v. *Fuhs, supra*; *People* v. *Brauer*, 389 Ill. 190, 58 N. E. 2d 869; *People* v. *Corrie*, 387 Ill. 587, 56 N. E. 2d 767; *People* v. *Corbett*, 387 Ill. 41, 55 N. E. 2d 74; *People* v. *Childers*, 386 Ill. 312, 53 N. E. 2d 878. In view of the statutory

requirements previously quoted (Ill. Rev. Stat. c. 38, § 730 (1937)), the silence of the records affords adequate ground for the minimum conclusions that the petitioner did not request counsel and did not, under oath, state that he, the petitioner, was "unable to procure counsel." In fact, the petitioner does not now claim that he did either of those things. The issue is, therefore, whether, in the absence of any request by the petitioner for counsel and, in the absence of any statement under oath by the petitioner that he was unable to procure counsel, the court violated due process of law under the Fourteenth Amendment by the procedure which it took and which accorded with the procedure approved by Illinois for noncapital cases such as these. This procedure called upon the court to use its own judgment in the light of the nature of the offenses, the age, appearance, conduct and statements of the petitioner in court. These circumstances included the petitioner's plea of guilty, persisted in after the court's admonishment of him and explanation to him of the consequences and penalties involved in his plea. The court thereupon granted leave to the petitioner to enter a plea of guilty and such a plea was entered by the petitioner in each case.

In this view of the two cases before us it is not necessary to consider whether the petitioner, by his plea of guilty or otherwise, affirmatively waived any right to the assistance of counsel in his defense, for, under these circumstances, no constitutional right to such assistance had arisen in his favor. Under the procedure followed by the trial court, there was no affirmative duty upon it, either of state or federal origin, to do more than it did. In the present cases the state statute allowed the petitioner to be represented by counsel if the petitioner desired to be so represented. The state statute and practice, however, did not require that the accused must be so represented or that the trial court must initiate inquiry into the peti-

tioner's desires. The statute did require that the court must assign counsel to conduct the defense for the accused if the accused stated under oath that he was unable to procure counsel. There is nothing in these records, however, either under oath or otherwise, to show that the petitioner, at the time of trial, either desired counsel or was unable to procure counsel.

The final question is therefore, whether, even in the absence of any state requirement to that effect, the provision requiring due process of law under the Fourteenth Amendment, in and of itself, required the court in these cases to initiate an inquiry into the desire of the accused to be represented by counsel, to inquire into the ability of the accused to procure counsel or, in the event of the inability of the accused to procure counsel, to assign competent counsel to the accused to conduct his defense. We recognize that, if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps.

These, however, were not capital charges. They were charges of the commission of two elementary offenses, carrying mandatory sentences of from one to 20 years each. We have considered the special circumstances as shown by these records. We do not find in them adequate ground for concluding that the state court, by failing to take the affirmative procedure suggested, violated due process of law under the Fourteenth Amendment. In reaching this conclusion it is not necessary for us to rely upon the statutory procedure of Illinois. It is appropriate, however, for us to consider the Illinois statutes and practice, as well as the statutes and practices of other states, as indicative that, in the judgment of the people of many of the states, it is not necessary to require further assurance of assistance of counsel to conduct the defense

of a person accused of crimes of this character and under these circumstances.

It is established that it is permissible and well within "due process of law" for a person, accused of such crimes, to waive his rights, if any, to the assistance of counsel for his defense, whether or not the accused also shall plead guilty.[22] If such waiver is to be effective, it must be intelligently, competently, understandingly and voluntarily made. In the instant cases, the only evidence before us of any affirmative waiver of a right to the assistance of counsel, if any such right existed, appears in the petitioner's pleas of guilty. There was, however, no need in these cases for a waiver by the petitioner of additional action by the trial court because the petitioner had no state or federal right to such action. Consequently, it is not necessary to inquire into the effectiveness of the petitioner's pleas as amounting to waivers of counsel, as well as admissions of guilt.

It may be that the state laws of some other states would have required affirmative inquiries to have been made by the court. It may be that, some day, all of the states will have adopted practices corresponding to the new rule in the federal courts[23] or to the recommendations of the American Law Institute, *supra*. However, as the matter now stands, the states have substantial discretion to determine in the light of their respective histories and needs, many practices in their criminal procedure, including this practice.

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[22] *Carter* v. *Illinois*, 329 U. S. 173, 174–175; *Rice* v. *Olson*, 324 U. S. 786, 788–789; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 276–279; *Walker* v. *Johnston*, 312 U. S. 275, 286; *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 467–469. See The Right to Benefit of Counsel Under the Federal Constitution, 42 Col. L. Rev. 271, 277–280 (1942).

[23] See note 17, *supra*.

The issue in the instant cases is only whether or not the action taken by the state court violated the Fourteenth Amendment. In answering that question in the negative, this opinion follows the principles which have been announced by this Court in passing upon somewhat similar issues where the accused has been tried in a state court for a noncapital offense and where complaint has been made that there was violation of due process of law under the Fourteenth Amendment. Recently, this Court said that, although failure to assign counsel to assist an accused in his defense in a federal court for a noncapital crime might violate the express provisions of the Sixth Amendment, that did not mean that a like failure to do so in an Illinois prosecution for the noncapital felony of burglary would violate due process of law under the Fourteenth Amendment. *Foster* v. *Illinois*, 332 U. S. 134. A comparable conclusion has been reached under the Fifth and Fourteenth Amendments as to self-incrimination by a defendant in a criminal case, particularly in relation to the right of counsel for the state to comment on the defendant's failure to testify. *Adamson* v. *California*, 332 U. S. 46. Refusal by a Maryland court to appoint counsel requested by the accused to assist him in his defense against a charge of commission of the noncapital felony of robbery was held not to violate the Fourteenth Amendment. *Betts* v. *Brady*, 316 U. S. 455. In that case the commission or nature of the offense charged was not the issue because the defense was merely that of an alibi.

On the other hand, this Court repeatedly has held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment. *Carter* v. *Illinois*, 329 U. S. 173;

Hawk v. *Olson*, 326 U. S. 271; *Tomkins* v. *Missouri*, 323 U. S. 485; *Williams* v. *Kaiser*, 323 U. S. 471; *Powell* v. *Alabama*, 287 U. S. 45; *Moore* v. *Dempsey*, 261 U. S. 86. See also, *De Meerleer* v. *Michigan*, 329 U. S. 663 (convicted of first degree murder and sentenced to life imprisonment).

In a noncapital state felony case, this Court has recognized the constitutional right of the accused to the assistance of counsel for his defense when there are special circumstances showing that, otherwise, the defendant would not enjoy that fair notice and adequate hearing which constitute the foundation of due process of law in the trial of any criminal charge. *Rice* v. *Olson*, 324 U. S. 786. In that case the immediate issue was one of waiver, but the underlying question involved a charge of burglary against an ignorant Indian, coupled with a complex legal issue arising from the claim that the crime was committed on an Indian reservation. For discussions bearing on the absence of due process resulting from the inability of the defendant, intelligently and competently, either to plead guilty or to defend himself in certain noncapital cases see *Foster* v. *Illinois*, 332 U. S. 134, 137–138; *Canizio* v. *New York*, 327 U. S. 82, 84–85 (robbery in the first degree); *House* v. *Mayo*, 324 U. S. 42, 45–46 (burglary); *Smith* v. *O'Grady*, 312 U. S. 329, 332–334 (burglary); *Powell* v. *Alabama*, 287 U. S. 45, 70 (dictum as to deportation cases).

For the foregoing reasons, and under the principles previously announced by this Court, the judgment of the Supreme Court of Illinois is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 398.—October Term, 1947.

Roy Bute, Petitioner,
v.
People of the State of Illinois.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[April 19, 1948.]

Mr. Justice Douglas, with whom Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Rutledge concur, dissenting.

In considering cases like this and the ill-starred decision in *Betts* v. *Brady*,[1] 316 U. S. 455, we should ask ourselves this question: Of what value is the constitutional guaranty of a fair trial if an accused does not have counsel to advise and defend him?

The Framers deemed the right of counsel indispensable, for they wrote into the Sixth Amendment that in all criminal prosecutions the accused "shall enjoy the right . . . to have the Assistance of Counsel for his defence." Hence,

[1] *Betts* v. *Brady* was decided June 1, 1942. Benjamin V. Cohen and Erwin N. Griswold, writing in the New York Times, August 2, 1942, stated:

"Most Americans—lawyers and laymen alike—before the decision in *Betts* v. *Brady* would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our own Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in *Betts* v. *Brady* would not wish their decision to be used to discredit the significance of that right and the importance of its observance.

"Yet at a critical period in world history, *Betts* v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law."

if this case had been tried in the federal court appointment of counsel would have been mandatory, even though Bute did not request it. See *Johnson* v. *Zerbst*, 304 U. S. 458, 463. I do not think the constitutional standards of fairness depend on what court an accused is in. I think that the Bill of Rights is applicable to all courts at all times. MR. JUSTICE BLACK demonstrated in his dissent in *Adamson* v. *California*, 332 U. S. 46, 68, 71, that a chief purpose of the Fourteenth Amendment was to protect the safeguards of the Bill of Rights against invasion by the states. If due process as defined in the Bill of Rights requires appointment of counsel to represent defendants in federal prosecutions, due process demands that the same be done in state prosecutions. The basic requirements for fair trials are those which the Framers deemed so important to procedural due process that they wrote them into the Bill of Rights and thus made it impossible for either legislatures or courts to tinker with them. I fail to see why it is due process to deny an accused the benefit of counsel in a state court when by constitutional standards that benefit could not be withheld from him in a federal court.

But if we take the view more hostile to the rights of the individual and assume that procedural due process guaranteed by the Fourteenth Amendment provides lesser safeguards than those of the Bill of Rights, the result should be the same. Then the question is whether the appointment of counsel for Bute was required "by natural, inherent, and fundamental principles of fairness." *Betts* v. *Brady*, *supra*, p. 464.

Illinois allows counsel to everyone charged with crime. To obtain counsel, however, the accused has to ask for one and also to state upon oath that he is unable to procure counsel.[2] *People* v. *Van Horn*, 396 Ill. 496, 498.

[2] "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel,

But, as held by the Illinois Supreme Court in the present case, the court need not advise him of his right to counsel.[3] The Illinois rule apparently proceeds from the premise that the average person knows of his right to counsel and resorts to an attorney in case he gets caught in the toils of the law. That view, if logically applied, would not require appointment of counsel in any case—capital or otherwise. For a man charged with murder usually knows whether or not it was his blow or shot that killed the deceased and therefore whether he is unjustly accused. And he certainly knows he is in serious trouble when he is faced with such a charge. The logic of the Illinois view would lead to the conclusion that the average man in those circumstances would know enough to demand a lawyer to defend him and that the court need not offer one to him.

Fortunately for the liberal tradition the law has followed a different course. At least where the offense charged is a capital one, due process requires appointment of counsel in state as well as in federal prosecutions. *Powell* v. *Alabama*, 287 U. S. 45; *Williams* v. *Kaiser*, 323 U. S. 471; *De Meerleer* v. *Michigan*, 329 U. S. 663. The reason is that the guilty as well as the innocent are entitled to a fair trial, that a layman without the experience and skill of counsel to guide him may get lost in the intricacies of the law and lose advantages which it extends to every accused, that without expert appraisal

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the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private.

"Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, ..." Ill. Rev. Stat. c. 38, § 730 (1937).

[3] For a summary of the Illinois cases, see the dissenting opinion of Mr. Justice Rutledge in *Foster* v. *Illinois*, 332 U. S. 134, 143–144.

of the circumstances surrounding his arrest, detention, arraignment, and conviction the penalties he suffers may be aggravated by his own ignorance or by overreaching of the prosecution or police.[4] Hence the need for counsel exists in capital cases whether the accused contests the charge against him or pleads guilty. *Foster* v. *Illinois*, 332 U. S. 134, 137.

Those considerations are equally germane though liberty rather than life hangs in the balance. Certainly due process shows no less solicitude for liberty than for life. A man facing a prison term may, indeed, have as much at stake as life itself.

Bute was charged with a most repulsive crime. It may seem easy to say that it is a simple and uncomplicated one, and therefore that he should know whether he committed it and whether he stood in need of counsel. But it has long been recognized that the charge of taking indecent liberties with a child is, like rape, "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."

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[4] The classic statement is that of Mr. Justice Sutherland in *Powell* v. *Alabama*, *supra*, pp. 68–69:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

1 Hale's Pleas of the Crown 634. As stated by the Illinois Supreme Court in *People* v. *Freeman*, 244 Ill. 590, 594, "Public indignation is even more apt to be aroused in prosecutions for crimes of this kind against children than when the charge is brought by an adult." Certainly the appraisal of such imponderables, the weight of the prosecution's case, the character of the defense which is available [5] are all questions which only a skilled lawyer can consider intelligently. A layman might rush to confession where counsel would see advantages in a trial before judge or jury. Counsel might see weakness in the prosecution's case which could be utilized either in standing trial or in pleading guilty to a lesser offense. These are the circumstances of the present case which Bute uses to appeal to our conscience. They without more convince me that we could be sure Bute had a fair trial only if counsel had stood at his side and guided him across the treacherous ground he had to traverse.

Betts v. *Brady*, *supra*, holds that we must determine case by case, rather than by the Sixth Amendment, whether an accused is entitled to counsel. A man who suffers up to 20 years in prison as a penalty is undergoing one of the most serious of all punishments. It might not be nonsense to draw the *Betts* v. *Brady* line somewhere between that case and the case of one charged with violation of a parking ordinance, and to say the accused is entitled to counsel in the former but not in the latter. But to draw the line between this case and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence ~~and~~ presence of *need* for counsel. Yet it is the *need* for counsel that establishes the real standard for determining whether the

[5] The specific intent which is an ingredient of this offense may be disproved by a showing of intoxication (*People* v. *Klemann*, 383 Ill. 236) or insanity. Ill. Rev. Stat. (1937) c. 38, §§ 590, 592.

lack of counsel rendered the trial unfair. And the need for counsel, even by *Betts* v. *Brady* standards, is not determined by the complexities of the individual case or the ability of the particular person who stands as an accused before the court. That need is measured by the *nature* of the *charge* and the *ability* of the *average* man to face it alone, unaided by an expert in the law. As *Powell* v. *Alabama, supra,* indicates, the need for counsel in capital cases is great even though the defendant is an intelligent and educated layman. The need is equally as great when one stands accused of the serious charge confronting Bute.